No. 1151

United States Circuit Court of Appeals
for the Ninth Circuit.

CHARLES L. INTERMELA and the AMERICAN SURETY COMPANY, a corporation of the State of New York,

Plaintiffs in Error.

vs.

DAVID PERKINS,

Defendant in Error.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

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Lowman & Hanford Co., Seattle

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Lowman & Hanford Co., Seattle

INDEX.

In the District Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff and Defendant in Error,

vs.

CHARLES L. INTERMELA and the AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants and Plaintiffs in Error.

No. 1931.

NAMES AND ADDRESSES OF COUNSEL:

J. A. BENTLEY, Esq.,
Port Townsend, Washington
Attorney for Plaintiff and Defendant in Error.

CHARLES E. SHEPARD, Esq.,
614 New York Block, Seattle, Washington
Attorney for Plaintiff and Defendant in Error.

U. D. GNAGEY, Esq.,
Port Townsend, Washington
Attorney for Defendants and Plaintiffs in Error.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,

vs.

CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.

No. 1931.

COMPLAINT.

Comes now the above named plaintiff, by J. A. Bentley, his attorney, and respectfully shows to this Honorable Court that leave to commence this action was duly granted him by this Court on the 19th day of December, 1910; that the matter in dispute in this action, exclusive of interest and costs, exceeds the sum of two thousand dollars; that the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela a citizen of the State of Washington, and the defendant, The American Surety Company, is a corporation of the State of New York.

For a cause of action against the said defendants, plaintiff alleges that the City of Port Townsend is a city of the third class with less than twenty thousand inhabitants in the County of Jefferson and State of Washington, and has been such at all the times mentioned in this complaint; that the defendant Charles L. Intermela is treasurer of said city, and has been such ever since the third day of January, 1910, at which time he succeeded himself as treasurer of said city during the full term of that office which commenced on the fifth day of January, 1909.

The plaintiff further shows that before the said defendant Charles L. Intermela entered upon his duties of treasurer of

the said City of Port Townsend for the term of office which commenced on the fourth day of January, 1910, he, with the said defendant, The American Surety Company, a corporation of the State of New York, duly executed, delivered, and filed with the City Clerk of said City of Port Townsend, his official bond in words and figures substantially as follows, to-wit:

"KNOW ALL MEN BY THESE PRESENTS: That we, CHARLES L. INTERMELA, of the City of Port Townsend, State of Washington, as principal, and the AMERICAN SURETY COMPANY of NEW YORK, a corporation organized under the laws of the State of New York and duly authorized to do a surety business and act as surety on bonds within the State of Washington, as surety, are held and firmly bound unto the City of Port Townsend, a city of the third class within the County of Jefferson, State of Washington, in the penal sum of Fifteen Thousand Dollars ($15,000.00), gold coin of the United States of America, for which payment well and truly to be made unto the City of Port Townsend we bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22nd day of December, 1909.

NOW the condition of the above obligation is such, That

WHEREAS, the said Charles L. Intermela was, by the citizens of the said City of Port Townsend, on the 7th day of December, 1909, duly elected at a regular election duly held, to the office of City Treasurer of the City of Port Townsend aforesaid, for the year beginning January 4th, 1910, and until his successor shall be duly elected and qualified.

NOW, THEREFORE, if the said Charles L. Intermela shall faithfully perform all of his duties as such Treasurer of the said City of Port Townsend according to law and City Ordinances of said city, and including all of his duties of all offices of which he is ex-officio incumbent and also including the faithful discharge of all duties which may be required of said

City Treasurer by any law enacted subsequent to the execution and delivery of this obligation, and shall account for and pay over all money which may come into his hands as such Treasurer, then this obligation to be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the seal and signature of said principal is hereto affixed, and the corporate seal and name of said surety is hereunto affixed and attested by its duly authorized officers.

CHARLES L. INTERMELA,
AMERICAN SURETY COMPANY OF NEW YORK.
(Seal) By R. D. Weldon, Resident Vice-President.

Attest: F. L. Hemming, Resident Assistant Secretary.
Witness: Jas. W. B. Scott.

The plaintiff further shows that the said City of Port Townsend, on the 18th day of February, 1898, duly issued and delivered to Alonzo Elliott, a citizen of the State of New Hampshire, a warrant upon the City Treasurer of said City for the sum of fifteen hundred and forty-eight dollars and twelve cents, payable with six per cent interest per annum out of the indebtedness fund of said City; which said warrant is substantially in the following words and figures, viz.:

$1548.12. Port Townsend, Wash., Feby. 18th, 1898. No. 2.

By order of CITY COUNCIL, Feby. 17th, A. D. 1898, of the CITY of PORT TOWNSEND, WASH.

The Treasurer of said City will pay Alonzo Elliott, or order, Fifteen Hundred and forty-eight—12/100 Dollars. For full satisfaction of judgment of Alonzo Elliott vs. City of Port Townsend, with interest at 6% per a

Indebtedness Fund

August Duddenhausen,
City Clerk.

D. H. HILL,
Mayor of the City of Port Townsend.

(Endorsed on the back)

Presented Feb. 19, 1898. Not paid for want of funds.

JOHN SIEBENBAUM,
City Treasurer.

Without recourse
A. Elliott.

The plaintiff further shows that on the 19th day of February, 1898, after said warrant had been so issued and delivered to said Alonzo Elliott, said Elliott presented the same to the treasurer of said City of Port Townsend and demanded payment thereof; that said treasurer refused to pay the same for want of funds, and then and there endorsed upon the back of said warrant the following words and figures, viz.:

"Presented Feby. 19, 1898.
Not paid for want of funds.
John Siebenbaum, City Treasurer."

The plaintiff further shows that after the said warrant had been so as aforesaid endorsed by said City Treasurer the said Alonzo Elliott, for value, duly endorsed and transferred the same to the plaintiff, who is now the holder and owner thereof and was such owner on and before the 1st day of December, 1910; and there was on said day due and owing to the plaintiff upon said warrant the principal sum of fifteen hundred and forty-eight dollars and twelve cents and the sum of eleven hundred and eighty-seven dollars and forty cents interest thereupon from the 19th day of February, 1898, at the rate of six per cent per annum, amounting altogether to the sum of twenty-seven hundred and thirty-five dollars and fifty-two cents.

The plaintiff further shows that on said 1st day of December, 1910, and for several months prior thereto, there was and had been in the hands of the defendant Charles L. Intermela as treasurer of the said City of Port Townsend, money belonging to the indebtedness fund of said city sufficient to pay the

plaintiff's said warrant both principal and interest in full, after deducting from the total amount of money in his hands belonging to said indebtedness fund of the city a sufficient sum to fully pay all warrants, certificates and other obligations and indebtedness of said city which by law are or were entitled to be paid out of the indebtedness fund of said city, before the payment of the plaintiff's warrant out of the moneys belonging to such fund.

The plaintiff further shows: that all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend which have or had preference over the plaintiff's said warrant for payment out of money in the city treasury of said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city long prior to the fourth day of January, 1910, and the plaintiff's said warrant is next in order of number and date after the warrants, certificates and other obligations and indebtedness of the said city so as aforesaid called in, or paid.

The plaintiff further shows that long before the said first day of December, 1910, it became and continued to be the duty of said Charles L. Intermela as treasurer of said City of Port Townsend to call in the plaintiff's said warrant for payment, but he failed and neglected so to do; that on the aforesaid 1st day of December, 1910, he presented his above mentioned warrant to the defendant Charles L. Intermela, as treasurer of said City of Port Townsend, at his office in said city and demanded payment thereof; that it was then and there the duty of said Intermela as such treasurer to pay the same, nevertheless he refused to make payment of said warrant, or any part thereof. Whereby, on the said first day of December, 1910, the said defendants became indebted to the plaintiff upon the aforesaid bond in the sum of two thousand seven hundred and thirty-five dollars and fifty-two cents.

WHEREFORE, in consideration of the premises, the plaintiff prays judgment against the defendants for the sum of two thousand seven hundred and thirty-five dollars and fifty-two

cents and interest thereon from the first day of December, 1910, besides his costs and disbursements in this action.

Dated December 19th, 1910.

J. A. BENTLEY,
Attorney for Plaintiff.

State of Washington,
County of King.—ss.

J. A. BENTLEY, first being duly sworn, deposes and says that he is the attorney for the plaintiff in the foregoing complaint described; that the reason for affiant making this verification is that said plaintiff is not within the County of King, but in the State of Massachusetts his place of residence; and affiant says that he verily believes that the statements made in the foregoing complaint are true.

J. A. BENTLEY,

Subscribed and sworn to before the undersigned this 19th day of December, 1910.

(Seal) R. S. BLOSS.

Indorsed: Complaint. Filed U. S. Circuit Court, Western District of Washington, Dec. 19, 1910. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY of New York, a corporation,
Defendants.
No. 1931.

APPEARANCE.

To the Clerk of the Above-Entitled Court:

You will please enter my appearance as attorney for the defendant Charles L. Intermela and The American Surety Company in the above entitled cause. Service of all subsequent papers, except writs and process, may be made upon said defendants by leaving the same with

U. D. GNAGEY,
P. O. Address: Port Townsend, Washington.

Indorsed: Appearance. Filed U. S. Circuit Court, Western District of Washington, Jan. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

MOTION.

Come now the defendants herein by their attorney U. D. Gnagey and move the court for an order requiring the plaintiff to make his complaint more definite and certain in the following respects:

First: By stating in the paragraph on page five of said complaint commencing with the eighth line thereof and ending with the twentieth, whether the moneys claimed by plaintiff to have been in the hands of said Charles L. Intermela belonging to the indebtedness fund, were actually placed in the said indebtedness fund by said defendant Intermela, or were by said defendant placed in another fund, and if it is claimed by said plaintiff that moneys belonging to said indebtedness fund were by him placed in some other fund, by stating from what source such moneys were derived and in what fund they were placed.

Second: By stating, in the paragraph on page six of said complaint beginning with the first line thereof and ending with the fifteenth, the facts which plaintiff claims made it the duty of said defendant Intermela as treasurer to call plaintiff's purported warrant, and by further stating the time when such facts arose.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Motion to Make Complaint More Definite and Certain. Filed U. S. Circuit Court, Western District of Washington, Jan. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States in and for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

ORDER.

Now on this day this cause comes on to be heard upon motion of the defendants for an order requiring plaintiff to make his complaint more definite and certain; the Court after hearing argument of respective counsel and being fully advised in the premises denies said motion.

Upon motion of defendants' attorney in open court for fifteen (15) days' time to answer the plaintiff's complaint, plaintiff's counsel consenting thereto, it is hereby ordered that the defendants have until January 31, 1911, to file and serve upon plaintiff's attorney their answer to the complaint.

Dated this 16th day of January, 1911.

C. H. HANFORD, Judge.

Indorsed: Order. Filed U. S. Circuit Court, Western District of Washington, Jan. 16, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the United States Circuit Court for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

ANSWER OF DEFENDANTS.

Come now the defendants in the above-named cause Charles Intermela and the American Surety Company and for answer to plaintiff's complaint herein, admit each and every allegation contained in said complaint from the beginning thereof down to and including the twenty-second line on the third page thereof, but deny each and every other allegation therein contained, except such as are hereinafter admitted or set forth.

As a First Affirmative Defense to the said Action the said defendants allege as follows:

I.

That the City of Port Townsend, Washington, was duly incorporated by the act of the Legislative Assembly of the Territory of Washington entitled "An Act to incorporate the City of Port Townsend," approved on the 29th day of November, 1881, and the act amendatory thereto entitled "An Act to amend an act to incorporate the City of Port Townsend, Washington," approved November 28, 1883; and on August 16, 1896, the said city was duly re-incorporated under the general laws of the State of Washington, as a city of the third class and ever since said date has been and now is a city of the third class in said state.

2.

That the warrant described in plaintiff's complaint, as shown on the face of said warrant and as alleged in said complaint, was issued in satisfaction of a judgment in the case of Alonzo Elliott against the City of Port Townsend; that said cause was numbered 1784 of the Superior Court of the State of Washington for the County of Jefferson, in which said cause Alonzo Elliott was plaintiff and the said City of Port Townsend was defendant; and that said judgment was rendered on November 16, 1897, upon a complaint according to the prayer thereof, of which the following is a true copy, to-wit:

In the Superior Court of the State of Washington for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff.
vs.
THE CITY OF PORT TOWNSEND, a municipal corporation,
Defendant.
No. 1784.

COMPLAINT.

Now comes the above named plaintiff and complains of the above named defendant and for a cause of action against said defendant alleges and says as follows:

I.

That the above named defendant the City of Port Townsend was duly created and incorporated under an act of the legislative assembly of the Territory of Washington, entitled, "An Act to incorporate the City of Port Townsend," approved November 29th, 1881, and that the boundaries and limits of said defendant were revised and re-established by an act of the legislative assembly of the Territory of Washington, entitled

"An Act to amend an act to incorporate the City of Port Townsend," which act was approved November 28th, 1883, and that the said defendant existed as a municipal corporation under the said act approved November 29th, 1881, and the amendment thereto, approved November 28th, 1883, until December, 1896, when, conformable to the provisions of Section 10 of Article XI. of the Constitution of the State of Washington, and an act of the legislature of the State of Washington, approved March 27th, 1890, entitled, "An Act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency," and all amendments thereto, duly reincorporated, then taking all necessary steps therefor, and completing the said reincorporation, and that the said defendant at all of said times has been duly organized and incorporated as the identical municipal corporation theretofore incorporated and existing under the statutes and acts aforesaid, with the ordinances passed prior to such reorganization remaining in full force and effect, and succeeding to all the rights, privileges and obligations enjoyed and sustained by the said original corporation.

II.

That in and by section 2 of chapter one of the act of the legislative assembly of the Territory of Washington, entitled, "An Act to incorporate the City of Port Townsend," approved November 29th, 1881, it was provided that the said defendant may sue and be sued, plead or be interpleaded in all courts of justice, contract and be contracted with; and in and by section 7 in chapter 2 of said act approved November 29th, 1881, the said defendant was given and granted power to provide for clearing, opening, gravelling, improving and repairing streets, highways and alleys, and for the prevention and removal of all obstructions therefrom, or from any cross or sidewalks, and to provide for clearing streets, also for constructing sewers and cleaning and repairing the same, and to assess, levy and collect each year a road poll tax of not less than four nor more than six dollars on every male inhabitant of the said defendant

between the ages of 21 and 50 years, except persons that are a public charge, and also a special tax on property of not less than two nor more than four mills on every dollar's worth of property within the city, which taxes shall all be expended for the purposes specified in said sections and included in this paragraph as grants of power to the said defendant. And by and in section eight of the said act approved November 29th, 1881, the said defendant has power conferred upon it to construct and repair sidewalks, and to grub, pave, grade, macadamize and gutter any street, highway or alley therein, and to levy and collect a special tax or assessment on the lots and parcels of land fronting on such street, highway or alley sufficient to pay the expense of such improvement; provided, that unless the owners of more than one-half of the property subject to assessment for such improvement petition the council to make the same such improvement shall not be made unless five members of the council by vote assent to the making of the same. And in and by section ten of said act approved November 29th, 1881, the said defendant was given and granted power by general ordinances to prescribe the mode in which the charge on the respective owners or lots or land and on the lots or land shall be assessed and determined for the purposes authorized by said act, as herein set out, and that such charge when assessed shall be payable by the owner or owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessments, and that such charge may be collected and such lien may be enforced by a proceeding in law or in equity either in the name of the said defendant or in the name of the officer to whom it might direct payment to be made; and further, that in cases where an assessment was regularly made under the said act and payment thereof neglected or refused at the time when the same became due, the said defendant was entitled to demand and recover, in addition to the amount assessed and interest thereon at ten per cent. per annum from the time of such assessment, five per cent. to defray the expenses of col-

lection, which sum by said act was to be included in any judgment or decree which might be rendered in any suit brought for the collection thereof; and it was further provided in the said act, in section 109 thereof, that it, the said act, as a whole should take effect and be in force from and after the second day of January, A. D. 1881.

III.

That on the 31st day of April, 1885, the Common Council of the said City of Port Townsend duly and regularly passed an ordinance entitled "An Ordinance to provide for contracts for street improvements," which ordinance is numbered 117, and was on the 4th day of April, 1885, duly approved by the mayor of said city, and immediately upon said approval became operative and has ever since been and still is in full force and effect, which ordinance is in words as follows:

"Ordinance No. 117.

To Provide for contracts for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That within twenty days after the passage of any ordinance for curbing, paving, grading, filling, macadamizing or guttering any street, highway or alley in the City of Port Townsend, or for the construction or repair of any sidewalk in any such street, highway or alley, the city surveyor shall prepare and submit to the common council all necessary plans, specifications and estimates for such improvements, and such plans, specifications and estimates, when approved by said common council, shall be filed with the city clerk.

Sec. 2. That within three days after the filing of such plans, specifications and estimates, the clerk shall advertise a notice calling for sealed bids for such improvements to be made according to such plans, specifications and estimates. Such notice shall be published for five days successively in any newspaper published in the city. All bids must be filed in the office of the clerk on or prior to a day to be specified in such notice, and the clerk shall endorse on the envelope or cover of each

bid the date of filing the same; and he shall receive no bids after the day specified in such notice for receiving the same. Provided, that if no bid shall be received and accepted by the council in response to such notice, the clerk shall immediately advertise a similar notice, and he shall so advertise as many times as may be necessary, or until a contract shall be awarded for such improvement, unless otherwise ordered by the council, and shall receive bids in the same manner and subject to all the provisions of this ordinance, as in the case of the original call for bids.

Sec. 3. That at the first meeting of the Council after the time specified in any notice for bids, the Council shall open and consider all bids received, and may reject any and all, or may accept that of the lowest responsible bidder or bidders, and award a contract thereon. And the Council may, if deemed advisable, at the times of awarding any contract under the provisions of this ordinance, require the contractor or contractors to give a bond to the City of Port Townsend in any sum to be specified with sufficient sureties, to be approved by the mayor, conditioned for the faithful execution of the terms of the contract.

Sec. 4. That when any bid shall have been accepted by the Council, and a contract awarded thereon, such contract shall be reduced to writing and signed by the contractor or contractors, and by the mayor and clerk in behalf of the City, and sealed with the corporate seal of the city in duplicate, and one of the originals of such contract shall be filed with the clerk, and authority to sign such contract on behalf of the city is hereby conferred upon the mayor and clerk.

Sec. 5. That this ordinance shall take effect and be in force at and after five days after the same shall have been published.

Passed the Council April 3, 1885.

Approved April 4, 1885.

C. M. BRADSHAW, Mayor.

J. J. CALHOUN, City Clerk.

IV.

That on the 4th day of March, 1887, the said Common Council duly and regularly ordained and passed ordinance number 160 of the records of the said defendant, which ordinance is entitled "An ordinance prescribing the mode in which the charge on the respective owners of lots and lands, and on the lots and lands shall be assessed, determined and collected for street improvements," which ordinance is in words as follows:

"Ordinance No. 160.

AN ORDINANCE prescribing the mode in which the charge on the respective owners of lots and lands, and on the lots and lands shall be assessed, determined and collected for street improvements.

The City of Port Townsend does ordain as follows:

Section 1. That whenever the Common Council of the City of Port Townsend shall cause any part of any street, highway or alley therein to be curbed, paved, graded, macadamized or guttered, or cause any sidewalks to be constructed or repaired in any street, highway or alley in said city, the whole cost of such improvement shall be levied and become a lien upon the taxable real estate fronting on such street or alley as may be improved, and as may be without any assessment district established as hereinafter provided; provided, that if the city council at any one time cause two or more intersecting streets to be improved, the cost of so improving the area of the intersections shall be equally divided between the property fronting on each of said intersecting streets.

Sec. 2. That all assessments for such improvements shall be according to value, so that each lot or other smallest subdivision of real estate subject to assessment, shall be held for such portion of the whole cost of the improvement within an assessment district, as the value of such lot or smallest subdivision of real estate bears to the aggregate value of the assessable property within said assessment district. And as fix-

ing values, all improvements upon real estate shall be excluded, and the lands only shall be assessed; and the cost of any such improvement shall include all lawful charges and expenses incident to such improvement, and of making and collecting the assessment therefor.

Sec. 3. That the property fronting on any such improvement and subject to assessment therefor, shall constitute a special assessment district, and the boundaries of such assessment district shall be lines running parallel with the street to be improved through the middle of the tier of blocks fronting on such street, each side of the same; and in case the land so fronting is not parallel into blocks, then such line shall run parallel with the street so improved, at a distance of 110 feet from the boundary line between such street and the property abutting them, and such lines shall close with lines at right angles with such street across each terminus of the improvement. Provided, if the council shall at any one time cause two or more streets to be improved, districts shall nevertheless be formed with boundaries as herein provided, so that a separate district shall be formed for each street so improved. Provided, further, that when any street or any part thereof, shall be ordered improved, and such improvement is not to be of uniform character along the whole line of such improvement, then such improvement shall be divided into separate assessment districts so that each assessment district shall include only improvements of uniform character as near as may be.

This provision shall apply to the grading or other improvement of the road-bed of the street, and sidewalks, or to both, as the case may be, as that separate distance may be found for each kind of improvement, if deemed advisable by the council. In case more than one assessment district shall be required as above provided, or in any case the council shall deem it advisable to make separate districts for the different kinds of improvements, the length and nature of each assessment district shall be fixed by an order of the council at the time of

the equalizing of the assessment, as provided by section 6 of this ordinance.

Sec. 4. That within twenty days after the council shall have passed an ordinance for such improvement of any street, highway or alley, the city surveyor shall prepare and file with the clerk a plat of the street or streets so to be improved, and of the real estate subject to assessment therefor, showing the lines of each lot or smallest subdivision thereof; and within ten days thereafter the city assessor shall prepare and file with the clerk an assessment roll for the district, or an assessment roll for each of said assessment districts, if several streets are to be improved at the same time, upon which assessment roll each lot or smallest subdivision of real estate in such district shall be listed in the name of the owner thereof, if known, or as "unknown" and assessed at the actual cash value thereof, and such assessment roll shall be open for public inspection at the clerk's office from the filing thereof until the day of meeting of the council for equalization thereof, as herein provided.

Sec. 5. That within three days of the filing of such assessment roll, the clerk shall advertise a notice in some newspaper published in the city, to the effect that such assessment roll (describing it), has been filed in his office, that the same is open to public inspection and that any person feeling himself aggrieved by such assessment may apply to the Common Council to have the same corrected at a meeting of the council to be designated in such notice, which meeting shall be the first regular meeting after the last publication of such notice, and such notice shall be published for ten days in successive issues of said newspaper.

Sec. 6. That at the first regular meeting of the Common Council after the last publication of such notice, the Common Council shall equalize such assessment and shall hear all complaints concerning such assessment roll and determine the same, and may raise or lower the valuation of any lot or parcel of real estate listed on such assessment roll, so as to make the

assessment equal and uniform, as near as may be, upon all property in the district, and shall, if any lot or parcel of real estate in such district be found to have been omitted from such assessment roll list the same and place a just valuation thereon. Provided that valuation of any lot or parcel of real estate shall not be raised by the council without the owner's consent, until at least twenty-four hours after a written notice of such proposed change shall have been served upon the owner, or his agent, if such owner or agent can be found within the city, if not so found then a notice of such proposed change in the assessment roll must be published for at least three days in some newspaper published in the city, and the council may adjourn from time to time if necessary, until the regulation of such assessment roll is completed.

Sec. 7. That as soon as practicable after such assessment shall be equalized, and the nature and extent of assessment district shall have been fixed, and the cost of the improvement shall have been ascertained, the council shall by an order fix the rate of assessment for such district, or for each of such districts, as the case may be, so as to raise the necessary amount to pay for such improvement, in accordance with the provisions of this ordinance.

Sec. 8. That within ten days after the council shall have so fixed the rate of assessment for any district, the clerk shall extend upon the assessment roll for the same amount of the assessment upon such lot or parcel of real estate listed thereon, and prepare a duplicate of such assessment roll and deliver the same to the city treasurer, who shall within three days thereafter publish a notice in some newspaper published in the city, to the effect that all assessments upon such roll must be paid to him within thirty days after the first publication of such notice, or the same will become delinquent. Such notice shall be published for three days.

Sec. 9. That all assessments shall be collected by the treasurer, and if not collected within the time prescribed in the preceding section, the same shall then become delinquent,

and the same with interest, penalty and costs shall be collected by suit in foreclosure of the lien for the same in accordance with the provisions of the charter of the city.

Sec. 10. That this ordinance shall take effect and be in force at and after five days after the same shall have been published.

Passed the Council March 4, 1887.

Approved March 4, 1887.

D. W. SMITH, Mayor."

V.

That upon the petition to the said Common Council to make the same of the owners of more than one-half of the property subject to assessment therefor, the said Common Council, on or about the 31st day of August, 1888, by a vote of five members of said Council voting in the affirmative, duly and regularly determined to make an improvement on that part of Washington Street, between Taylor and Harrison Streets, within said city, and for that purpose duly and regularly ordained and passed ordinance number 212; that said ordinance on August 31st, 1888, was duly approved by the Mayor of said city and thereupon became operative and has ever since been and still is in full force; that the ordinance in this paragraph referred to is entitled "An ordinance for grading portions of Washington Street in the City of Port Townsend," and is in words as follows:

"Ordinance No. 212.

AN ORDINANCE for grading portions of Washington Street in the City of Port Townsend.

The City of Port Townsend does ordain as follows:

Section 1. That Washington Street from the easterly side of Taylor Street to the easterly side of Harrison Street be graded to the grade of said Washington Street as established by ordinance No. 201.

Sec. 2. That all lots and parcels of land fronting on said Washington Street as herein ordained, viz.: from the easterly side of Taylor Street to the easterly side of Harrison Street be and the same is hereby declared to be an assessment district for the purpose of this ordinance.

Sec. 3. This ordinance to take effect and be in force from and after five days from its publication.

Passed the Council Aug. 31, 1888.

Approved Aug. 31, 1888.

W. H. H. LEARNED, Mayor.

Attest: JAMES SEAVEY, City Clerk."

VI.

That within twenty days after the passage of said ordinance No. 212, referred to and set out in the next preceding paragraph the duly elected, qualified and acting city surveyor of the said defendant, agreeable and pursuant to said ordinance No. 117, prepared and submitted to the Common Council of the said defendant all necessary plans, specifications and estimates for the improvement and grading of the said Washington Street, as provided for in said ordinance No. 212, and such plans, specifications and estimates were by the said Common Council duly considered and approved and thereafter filed with the city clerk of the said defendant.

VII.

That within three days after the filing of said plans, specifications and estimates with him as aforesaid, the clerk of the said defendant duly caused to be published for five days successively in a newspaper published and printed within the limits of the said defendant, a notice calling for sealed bids for the improvement provided for by the passage of said ordinance No. 212, as aforesaid, to be made according to the plans, specifications and estimates filed with the clerk as aforesaid, which notice was in due form and specified a day prior to which

sealed bids made pursuant thereto should be filed with the clerk of the said defendant.

VIII.

That within the time limited in said notice so published by the clerk as aforesaid for the filing of sealed bids with him, one W. C. Williams, agreeable to the provisions of said ordinance No. 117, and in answer to the said notice, and agreeable to the provisions thereof, did submit in writing his bid for making the said improvement, which bid conformed to the requirements of the said notice and was duly sealed, and duly caused the same to be filed in the office of the clerk of the said defendant, and that the clerk thereupon duly endorsed upon the cover of the said bid the date of the filing of the same, which date was subsequent to the first day of the publication of the said notice and prior to the date limited therein for the filing of such bids.

IX.

That at the first meeting of the Common Council of the said defendant held subsequent to the time specified in the said notice after which bids thereunder should not be received, the said Common Council duly opened and considered all of the bids filed with the clerk for the said improvement agreeable to the terms of the said notice, and then and there accepted as the lowest responsible bidder for the making of the said improvement the bid of the said W. C. Williams and awarded him a contract for the making of the said improvement under the authority of the said ordinance No. 117, and thereafter and in pursuance of the said acceptance and award the said defendant and the said W. C. Williams duly entered into a contract in writing, which contract was duly signed by the said W. C. Williams and by the mayor and the clerk of the said defendant in behalf of the said defendant, and under the corporate seal of the said defendant, in duplicate, which contract is in words and figures as follows:

"This agreement made and entered into this 15th day of October, 1888, by and between the municipal corporation, the City of Port Townsend, the party of the first part and W. C. Williams of Seattle, W. T'y, the party of the second part,

Witnesseth that whereas the said party of the first part by order and resolution duly passed by its Common Council at a regular session thereof held on the 21st day of September, 1888, did invite and call for bids and proposals to do certain work on Washington Street in said city which is more fully described hereinafter, and whereas the said city by its Common Council did on the 1st day of October, 1888, at a regular session of said council accept the bids for said work and regularly offered and filed by said party of the second part he being the lowest responsible bidder for said work and

Whereas the said city through its said council thereupon and thereafter duly authorized a contract to be entered into between said city and said second party for the doing of said work and instructed the mayor and clerk to sign and execute said contract on the part of said city,

Now therefore it is hereby agreed by and between the said parties hereto that said party of the second part for the consideration hereinafter named agrees that he will do the work of grading Washington Street in said city from the easterly side of Taylor to the east side of Harrison Streets in said city according to the plans and specifications made by the city surveyor and accepted by the party of the first part and now on file with the clerk of said first party.

It being expressly agreed, understood and covenanted that the bulkinh heading set forth in said plans and specifications is considered as, treated as, and is a part of the grading of said street and that said bulkheading is to be as in said plans and specifications set forth, and it is hereby agreed that the specifications and plans hereinbefore referred to are made part of and are a part and parcel of this agreement.

And it is hereby agreed by said second party to do said work of grading, including bulkheading, in a good workman-

like manner and according to plans and specifications aforesaid and to the satisfaction of said party of the first part, its Common Council and the committee on streets of said first party. And the said work of grading, including bulkheading, to be fully done and completed within seventy (70) days from the date of the execution of this contract. And the said party of the first part agrees to pay to the said second party, and the said party of the second part agrees to accept as compensation therefor, at the rate of forty-nine (49) cents per cubic yard of earth in all excavations completing said grade from east side of Taylor to the east side of Harrison Street, and for cribbing and bulkheading seventeen and seventy-five one-hundredths dollars ($17.75) per thousand feet for all lumber used in bulkheading or cribbing. Warrants or orders of said city, drawn upon the Washington Street Improvement Fund as follows: At the first regular meeting of the Common Council in the month of December, A. D. 1888, seventy-five (75) per cent. of the contract price for such portion of the work as the city surveyor and committee on streets shall certify to have been completed up to December 1st, 1888, and for the balance of said contract price at the first regular meeting of the Council after the completion of said improvement and approved by said surveyor and said Council.

In witness whereof said party of the first part has caused these presents to be signed by its Mayor and City Clerk and sealed with its seal this ..... day of October, A. D. 1888.

W. H. H. LARNED, Mayor. (Seal)
JAMES SEAVEY, Clerk. (Seal)
W. C. WILLIAMS. (Seal)

Signed, sealed in presence of

W. F. LEARNED,
GEO. H. JONES.
(Corporate Seal) H. H. AMES,
CHAS. K. JENNER,
As to W. C. Williams."

X.

That the said W. C. Williams fully complied with the requirements of the said ordinance No. 117 in regard to such contracts, and did in pursuance of the requirements of the said Common Council duly execute and deliver his bond with good and sufficient sureties to the defendant in the sum specified by the said defendant, conditioned for the faithful execution of the terms of the contract set out in the next preceding paragraph, which bond was duly presented to and approved by the Mayor of the said defendant.

XI.

That pursuant to his contract with the city the said W. C. Williams entered upon the execution thereof and completed the said improvement according to the terms of his said contract and the ordinances relating to the same, and fully complied with all the terms and conditions of the said contract under the supervision of the street committee and the city surveyor of the said defendant, and that thereafter the said defendant and the said W. C. Williams met together and had a settlement for and concerning the work done under the said contract, and that the said defendant by its proper officers and agents duly accepted the said work and acknowledged the full performance and completion of the said contract according to its terms by the said W. C. Williams, and he and his sureties upon the said bond were duly released and discharged.

XII.

That after the completion of the said improvement and the full performance of the said contract by the said W. C. Williams as aforesaid, the said defendant issued, among others, to him, as a voucher for money due for services rendered under the said contract a certain street improvement warrant, numbered 19, dated February the 11th, 1889, for the sum of one thousand dollars, which street improvement warrant is in the words and figures as follows:

"No. 19.

City of Port Townsend, W. T., February 11th, A. D. 1889.

By order of City Council of February 9th, A. D. 1889, The Treasurer of the City of Port Townsend, Washington Territory: Pay to W. C. Williams or order, one thousand 00/100 dollars, and charge the same to the account of Washington Street Improvement Fund. The City of Port Townsend hereby guarantees the payment of said sum of $1000.00 with interest thereon at ten per cent. per annum payable semi-annually.

W. H. H. LEARNED,
Mayor of the City of Port Townsend.

$1000.00/100.

Attest: JAMES SEAVEY, City Clerk."

XIII.

That thereafter on the 14th day of February, A. D. 1889, the said warrant was duly presented to the said defendant and to the duly qualified and acting treasurer thereof for payment, and that payment thereof was refused for want of funds, and the fact of such presentation and refusal of payment for said cause was endorsed on the back of the said warrant by the said city treasurer under date of the said 14th day of February, A. D. 1889.

XIV.

That after the said warrant was issued and prior to the demand hereinafter alleged, for a valuable consideration, the said warrant was assigned by the said W. C. Williams to this plaintiff, together with all demands and causes of action thereon or thereunder, including the demands evidenced thereby against the said fund required by said ordinance to be provided for the payment of the same, and the right of action thereon against the said City of Port Townsend for failure to provide the said fund, were transferred and made over to this plaintiff, and this plaintiff has ever since been and now is the

owner and holder of the said warrant and the said rights and privileges.

XV.

That no payments whatsoever have been made upon the said warrant, except that interest has been paid thereon to the 11th day of August, 1892.

XVI.

That at divers and sundry times since the said warrant was first presented for payment as aforesaid and payment thereof refused, the said defendant has been requested by the plaintiff to provide a fund for the payment of the said warrant, which it the said defendant has at all times neglected and refused to do.

XVII.

That by virtue of its charter and of the said ordinances No. 160 and No. 212 heretofore pleaded, the said City of Port Townsend was and is charged with the duty of constituting a special assessment district consisting of the property fronting upon said improvement and establish boundaries of such district embracing the property abutting upon the portion of Washington street improved as aforesaid. and of levying an assessment upon the property included within the bounds of such improvement district sufficient in amount to pay the contract price of said improvement, the contract price being a sum not exceeding the amount of said warrant and all other warrants issued for said improvement, and was and is also so charged with the duty of collecting such assessment after the levy thereof, thereby creating the fund referred to in said warrant.

XVIII.

That under and by virtue of its charter and said ordinances number 160 and 212 and the law in that behalf provided, the said defendant constituted such a special assessment district as it was required to do, including the property fronting and

abutting upon that portion of Washington Street improved as aforesaid, and pretended to file a plat of the said street so to be improved as aforesaid, and the real estate subject to assessment therefor, and in part only complied with the provisions of said ordinances for assessing the cost of said improvement upon the property embraced within the said improvement district, and although often requested so to do by the said plaintiff the said defendant has at all times failed and refused and still fails and refuses to comply with the provisions of the said ordinances and its said charter and assess the amount of said improvement or cause the same to be extended upon the assessment roll of the said defendant, or prepare a duplicate assessment roll and deliver the same to the treasurer of the said city, or take any step whatsoever for the due and legal assessment of the said property or the collection of the amount of the cost of said improvement as by said ordinance provided, and that there is no money whatsoever in the said fund for the payment of the said warrant or any part thereof, and that the said defendant has wholly failed and neglected and refused to comply with any of the provisions and terms of said contract or the said ordinances in that behalf.

XIX.

That since the date of the said contract and the date of the completion thereof the property adjoining and fronting upon said improvement has greatly depreciated in value, and has in many instances become subject to liens for delinquent taxes, and has been sold and encumbered by different owners thereof, and that by reason of the defendant failing to make the assessment and collect the same with which to pay the cost of said improvement, and by reason of the defendant's neglect and failure to properly make assessment of the amount of said improvement, the means of payment of the cost of said improvement under and by virtue of the charter of the said defendant and the statute in that behalf provided, have been wholly lost to the plaintiff and his assignor, and that the said plaintiff and his

assignor have at all times used due diligence in demanding the collection of the said assessment of the said defendant and are without fault in the premises.

XX.

That for the purpose of inducing the said W. C. Williams and his assignee to rely upon its good faith in the premises and upon its purpose to make payment for the said improvement, and to induce the said W. C. Williams to enter into said contract, and as an assurance that the said assessment would be by the said defendant levied promptly and duly collected and paid, the defendant at the time of making the said contract offered to guarantee the payment of the said warrant, with interest thereon as specified therein, and did in pursuance of the said representation so indicate and promise in said warrant, and relying upon said representations on the part of the said defendant the plaintiff and his assignor were led to believe and did believe that the said defendant would cause said assessment to be duly and legally made, levied and collected and expended by the defendant in the payment of the said warrant and the indebtedness evidenced thereby.

XXI.

That at the time of incurring the said indebtedness for the said improvement as aforesaid the indebtedness of said defendant was not equal to one and one-half per cent. of the value of its taxable property, and that, too, including the amount of the indebtedness incurred by it on account of the said improvement.

XXII.

That by reason of the negligence on the part of the said defendant for failure to make said assessment and the collection of the same from the property abutting upon that portion of the street so improved, and by reason of the failure of the defendant to carry out the provisions of said contract and by reason of the facts heretofore set forth herein, the plaintiff

has been damaged in the amount represented by the said warrant as being due thereon as hereinafter stated.

XXIII.

That on or about the first day of June, 1897, the said plaintiff presented to the City Council of the City of Port Townsend his demand in writing duly verified against the said defendant for the sum of $1477.50, upon the said warrant, and for damages on account of the aforesaid negligence of the defendant, and that sixty days have elapsed since the said presentation, and that the said City Council has since said presentation rejected the said claim so as aforesaid presented to the defendant, and that there is now due and owing to the plaintiff the sum of $1477.50, with interest thereon from the 20th day of May, 1897, at the rate of ten per cent. per annum.

XXIV.

That at all times herein mentioned and referred to that portion of Washington Street improved as aforesaid and included within the special assessment district as laid off by the said defendant has been and now is within the territorial limits of the said defendant, and that at all times since the completion of the said improvement the said defendant has constantly used the said street so improved, and has received full benefit of the said improvement.

Wherefore, plaintiff demands judgment against the said defendant for the sum of $1477.50, together with interest thereon at the rate of ten per cent. per annum from the 20th day of May, 1897, and for plaintiff's costs and disbursements herein to be taxed.

PRESTON, CARR & GILMAN and
R. W. JENNINGS,
Attorneys for Plaintiff.

State of Washington,
County of Jefferson.—ss.

R. W. Jennings being first duly sworn on his oath deposes and says: That he is one of the attorneys for the plaintiff in

the above entitled action; that he has heard the foregoing complaint read, knows the contents thereof, and believes the same to be true; that he makes this affidavit for and on behalf of said plaintiff because plaintiff is a non-resident of the State of Washington, and is not now within said Jefferson County.

R. W. JENNINGS.

Subscribed and sworn to before me this 12th day of August, 1897.

(Seal) N. S. SNYDER,
Notary Public in and for the State of Washington,
residing at P. T., in said state.

3.

That the said judgment so rendered was and is void because based on a street grade warrant as shown by said complaint which said street grade could under no circumstances form the basis of a claim against the city; that the warrant described in plaintiff's complaint issued in satisfaction of the said judgment is likewise void and for the further reason that such warrant was ordered by the city council at a special meeting of said city council and not at a regular meeting thereof as required by law.

As a Second Affirmative Defense to the said Action Defendants allege as follows:

1.

Defendants repeat and make part of this affirmative defense each and every allegation contained in paragraph one (1) of their first affirmative defense herein.

2.

That the said plaintiff did not commence his said action within the time required by law; that the said warrant described in plaintiff's complaint was issued on February 18, 1898, by order of the city council made on February 17, 1898; that in January, 1899, the said City of Port Townsend de-

clared the said warrant illegal and invalid and refused to take any steps whatever to provide a fund for the payment of the same and refused to pay the same; that such action of said city was made a public record and spread upon the minutes of its Common Council; that plaintiff and plaintiff's assignor well knew or by the exercise of reasonable diligence should have known of such action for more than six years immediately preceding the commencement of this action; and that neither plaintiff nor his assignor brought any action on the said warrant nor did either take any legal steps or commence any legal proceedings whatever for the purpose of enforcing payment on the said warrant or compelling the said city to provide a fund for the payment of the same until the present action was commenced.

As a Third Affirmative Defense to the said action defendants allege as follows:

1.

They repeat and make part of this affirmative defense each and every allegation contained in paragraphs one (1) and two (2) of the first affirmative defense herein.

2.

That at the time said judgment was so rendered and before the issuance of the warrant described in plaintiff's complaint and before the same was ordered to issue by the city council, there were outstanding about $130,000.00 of street grade warrants issued on special funds of local improvement districts in said city of Port Townsend; that the said city of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. The City of Port Townsend, No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the city council of said city of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judg-

ment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six per cent. interest on the indebtedness fund of said city in satisfaction of such judgments; that long before the city council of said city entered into said agreement with said street grade warrant holders, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant; that notwithstanding said decision the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause No. 1784, Alonzo Elliott vs. The City of Port Townsend, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof about $100,000.00 of street grade warrants were reduced to judgment against the said city without any defense on the part of said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about $30,000.00 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on street grade warrants, and refused to recognize as valid any of the "Indebtedness Fund" warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and said city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants

as valid obligations against said city, and still refuses to allow any more judgments taken against said city on street grade warrants.

3.

That at the time said agreement was made and at the times said indebtedness fund warrants were so issued and ordered paid by the City Council, the said City of Port Townsend was indebted beyond its constitutional limit of indebtedness for other purposes; that the total assessed valuation of all taxable property in said city according to the assessments for city purposes was $1,541,426 for the year 1897 and $1,532,056 for the year 1898; that the total amount of the indebtedness of said city at all times during said year 1898 was before the issuance of any of the said indebtedness fund warrants, as aforesaid, and at the time of the making of the said agreement, over the sum of $200,000.00, exclusive of all of the said indebtedness fund warrants issued, all of said remaining street grade warrants issued, and exclusive of any indebtedness for supplying said city with water, artificial light or sewers; that the said city did not own or control any works for supplying such water, light or sewers before the year 1905; and that the total assets of said city, including the full amount of all uncollected taxes, penalties and interest due said city and moneys due from all other sources, did not at any time during said year 1898, exceed the total sum of $100,000.00.

4.

That at no time has the assent of three-fifths of the voters of said city voting at any election been had, in any manner whatever, for the purpose of incurring any part of the said $130,000.00 street grade indebtedness or any part of the said indebtedness fund warrant issue, nor has any part of said street grade indebtedness of $130,000.00 or any part of the said indebtedness fund warrant issue of $100,000.00, ever been in any manner authorized or validated by any of the voters or electors of said city.

Wherefore said defendants pray that they may go hence without day and that they may recover their costs and disbursements herein.

U. D. GNAGEY,
Attorney for said Defendants.

State of Washington,
County of Jefferson—ss.

C. L. Intermela being first duly sworn on oath deposes and says that he is one of the defendants mentioned in the foregoing answer and makes this verification for and in behalf of all of said defendants; that he has heard the said answer read, knows the contents thereof and believes the same to be true.

C. L. INTERMELA,

Subscribed and sworn to before me this 14th day of February, A. D. 1911.

(Seal) U. D. GNAGEY,
Notary Public in and for the State of Washington,
residing at Port Townsend, Wash.

Indorsed: Answer. Filed U. S. Circuit Court, Western District of Washington, Feb. 15, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

Comes now the above named plaintiff, by J. A. Bentley, his attorney, and replies to the respective affirmative defenses set up in the answer of the defendants as follows, viz:

REPLY TO THE FIRST AFFIRMATIVE DEFENSE.

The plaintiff, replying to the first affirmative defense, denies that the warrant issued by the City of Port Townsend to Alonzo Elliott described in the complaint is void for the reason alleged in said defense, nor for any reason; and denies that said warrant was ordered by the City Council of said city at a special meeting of said City Council; and denies that the judgment in the case of Alonzo Elliott against the City of Port Townsend in the Superior Court of Washington for the County of Jefferson, numbered 1784, was rendered on November 16, 1897, as alleged in said first defense, but the plaintiff avers that said judgment was rendered on the 14th day of November, 1897.

The plaintiff, further replying to said first defense, avers that a summons was duly issued in said action of Alonzo Elliott, plaintiff, against The City of Port Townsend, defendant, in the Superior Court of Washington for the County of Jefferson; that said summons was duly served upon the defendant, The City of Port Townsend, on or about the 19th day of August, 1897 by delivering a copy thereof, together with a copy of the

complaint in said action to the Mayor of said City; that thereafter and on or about the 7th day of September, 1897, the said City of Port Townsend duly appeared in said action and filed a demurrer to the complaint therein, substantially in the words, to-wit:

"*In the Sup. Court of the State of Washington, for the County of Jefferson.*

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND,
Defendant.

DEMURRER

Now comes the defendant in the above entitled action and demurs to the complaint of the plaintiff therein for that said complaint does not state facts sufficient to constitute a cause of action.

S. A. PLUMLEY,
Attorney for Defendant,
Port Townsend, Washington."

The plaintiff further avers that thereafter, and on or about the sixth day of November, 1897, the said action was duly tried by said Superior Court for the County of Jefferson, on the issue of said demurrer, and the following order thereupon made by the Judge of said Court, to-wit:

"In the Superior Court of the State of Washington, for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff.
vs.
THE CITY OF PORT TOWNSEND,
Defendant.

This cause coming on to be heard this 6th day of November, 1897, plaintiff appeared by his attorneys, Preston, Carr & Gilman and R. W. Jennings, and defendant by its duly elected, qualified and acting City Attorney, S. A. Plumley, Esq. After argument the Court orders that said demurrer be and the same is hereby overruled. Defendant excepts. Defendant by its attorney announces in open court its determination to stand upon its said demurrer and not to file any answer or further pleading herein.

Dated Nov. 6, 1897.

JAS. G. McCLINTON, Judge."

The plaintiff further avers that thereafter and on or about the 14th day of November, 1897, final judgment in said action was duly rendered by said Court in form and substance substantially as follows, to-wit:

"In the Superior Court of the State of Washington, for Jefferson County.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a municipal corporation,
Defendant.
No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint;

Now, therefore, by reason of said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of $1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge."

REPLY TO THE SECOND AFFIRMATIVE DEFENSE.

The plaintiff, replying to the second affirmative defense, denies that this action was not commenced within the time required by law; denies that in the month of January, 1899, or at any time more than six years before the commencement of this action the City of Port Townsend declared illegal, or invalid

the warrant of the said City of Port Townsend dated February 18, 1898, drawn in favor of Alonzo Elliott, described in the complaint, or refused to take steps to provide a fund for the payment thereof; and denies that such action, or proceeding of said city was made a public record, or was spread upon the minutes of the Common Council, or City Council of said city, more than six years before the commencement of this action; denies that the plaintiff, or plaintiff's assignor knew, or by the exercise of reasonable diligence should or might have known for six years immediately preceding the commencement of this action that the said City of Port Townsend had declared the aforesaid warrant illegal, or invalid, and refused to take steps to provide a fund for the payment thereof, or refused to pay the same—except, that on or about the 19th day of February, 1898, the treasurer of said city refused to pay the said warrant for want of funds, as is alleged in the complaint.

REPLY TO THE THIRD AFFIRMATIVE DEFENSE.

The plaintiff, replying to the third affirmative defense, denies that the said City of Port Townsend duly appealed from the judgment rendered against it in the said cause of Alonzo Elliott vs. The City of Port Townsend; but avers that no notice of appeal from said judgment was given in open court at the time it was rendered, and no notice of appeal from said judgment in writing was served upon the said Alonzo Elliott, nor upon his attorneys, nor upon either of them within ninety days after the rendition of said judgment, nor was any appeal bond ever filed by the said city, nor was the sum of two hundred dollars in lieu of such bond ever deposited with the Clerk of the Superior Court for the County of Jefferson, by which Court said judgment was rendered.

The plaintiff, further replying to said third defense, denies that the City Council of said City of Port Townsend, or the City of Port Townsend at any time entered into an agreement with the said Alonzo Elliott, the plaintiff in the action in which said judgment was rendered, that the said City of Port Town-

send would not defend his said action and would not appeal from a judgment to be rendered therein, nor resist payment of such judgment, but would satisfy such judgment by issuing warrants bearing six per cent. interest on the indebtedness fund of said City in satisfaction of such judgment; and denies that in furtherance of such agreement, or in compliance therewith the said City Council, or the said City of Port Townsend, abandoned its appeal from the judgment which had been rendered against said City in favor of said Elliott referred to in said third defense; and denies that the City Council, or the City of Port Townsend, voluntarily ordered the issuance of the warrant described in the complaint in satisfaction of said judgment, but avers that said City Council and the said City of Port Townsend ordered the issuance of said warrant, and issued the same, in pursuance of mandatory provisions of the statutes of the State of Washington and in accordance with an agreement on the part of the said Elliott made after the rendition of said judgment to accept in satisfaction of said judgment a warrant drawing six per cent. interest per annum instead of the greater rate of eight per cent. interest per annum, to which he would have been entitled except for his acceptance of the warrant drawing six per cent. interest per annum.

J. A. BENTLEY,
Attorney for Plaintiff.

State of Washington,
County of King—ss.

J. A. Bentley, first being duly sworn, deposes and says that he is the attorney for the plaintiff in the foregoing reply described; that the reason for affiant making this verification is that said plaintiff is not within the County of King, but in the State of Massachusetts his place of residence; and affiant says that he verily believes that the statements made in the foregoing reply are true.

J. A. BENTLEY.

Subscribed and sworn to before the undersigned this 9th day of March, 1911.

(Seal) R. S. BLOSS,
Notary Public in and for the State of Washington,
residing at Seattle.

Indorsed: Reply. Filed U. S. Circuit Court, Western District of Washington, Mar. 9, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

It is hereby stipulated and agreed by the respective parties to the above entitled action to waive a trial of said cause by a jury, and that the same shall be tried by the court without a jury.

Dated April 22d, 1911.

J. A. BENTLEY,
Attorney for Plaintiff.
U. D. GNAGEY,
Attorney for the Defendants.

Indorsed: Waiver of Jury. Filed U. S. Circuit Court, Western District of Washington, Apr. 24, 1911. Sam'l D. Bridges, Clerk. W. D. Covington, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

STIPULATION.

It is hereby stipulated by the attorneys of the respective parties in the above entitled cause, that the printed slips purporting to be copies of the city ordinances, of the City of Port Townsend, pasted in the book kept by the City Clerk of said city marked: "City Ordinances" are true and correct copies of original ordinances of the City of Port Townsend duly passed by the City Council of said city, approved and signed by the Mayor thereof, attested by the City Clerk and duly published in said City of Port Townsend in a newspaper printed within said city, and that said newspaper was duly designated as the official newspaper of said city; and that said printed copies may be offered and received in evidence upon the trial of the above entitled cause with the same effect by either party thereto, in place and in lieu of the original ordinances they respectively represent duly recorded by the City Clerk, the record of their due passage by the City Council, of the City of Port Townsend, approval and signing by the Mayor of said city, attestation by the City Clerk and due publication thereof in the City of Port Townsend.

U. D. GNAGEY.
J. A. BENTLEY,
Attorney for Plaintiff.

Indorsed: Stipulation that printed slips in ordinance book be recd. as evidence. Filed U. S. Circuit Court, Western District of Washington, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Circuit Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

The motion of plaintiff for a rule requiring the defendant Charles L. Intermela, to produce at the trial of this cause certain writings and documents, coming on to be heard this 7th day of July, 1911, upon special notice, and the defendant not appearing to oppose the same, on motion of J. A. Bentley, attorney for plaintiff, the defendant Charles L. Intermela is hereby ordered and required to have and produce on the trial of this cause on the 12th day of July instant or at such later date as the cause may be tried, the returns or letters signed by the County Treasurer of the County of Jefferson or by his deputy and delivered to the said Charles L. Intermela as Treasurer of the City of Port Townsend, which purport to enclose or accompany money, bank checks or drafts representing money belonging to the said City of Port Townsend, which said County Treasurer had derived from the sale of real estate by said County of Jefferson previously acquired through proceedings pursuant to the Statutes of Washington against such real estate for the non-payment of taxes, dated respectively January 11,

1909, February 6, 1909, March 10, 1909, May 10, 1909, June 11, 1909, July 10, 1909, October, 1909, November 9, 1909, December 11, 1909, January 3, 1910, March 4, 1910, April 8, 1910, May 10, 1910, July 8, 1910, and August, 1910. Also warrant calls by the defendant Charles L. Intermela as Treasurer of the City of Port Townsend, to-wit: Number 23, issued in April, 1908, and number 24 issued in June, 1908.

C. H. HANFORD, Judge.

Indorsed: Order to produce papers on the trial. Filed U. S. Circuit Court, Western District of Washington. July 7, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

United States Circuit Court Western District of Washington. Northern Division.

DAVID PERKINS, *Plaintiff.*

vs.

CHARLES INTERMELA, et al. *Defendants.*

No. 1931.

Filed Dec. 11, 1911.

MEMORANDUM DECISION ON THE MERITS.

This is an action upon the official bond of the treasurer of the City of Port Townsend to recover the amount of principal and interest due upon a warrant issued by the City in the year 1898 against a special fund in satisfaction of a judgment rendered by the Superior Court of the State of Washington for Jefferson County, against the City, in the month of November, 1897, which he has refused to pay, although money sufficient to make the payment has been received by him to the credit of said special fund.

The jurisdiction of this Court is contested on the ground that the amount in controversy is not sufficient to bring the case within the jurisdictional limit. This contention is on the assumption that the interest cannot be added to the principal sum for which the warrant was issued to make up the jurisdictional amount. This would be true if the warrant alone constituted the cause of action. But the complaint charges a breach of the conditions of the treasurer's official bond as the cause of action, and the right of action against him and his surety did not accrue until money applicable to the payment of the warrant came into his custody, and when the demand for payment was made and refused he became obligated to pay the accrued interest as well as the principal then due on the warrant, the aggregate amount of which exceeds $2,000. Therefore the Court overrules the defendants' objections to its exercise of jurisdiction.

Upon the defendants' admissions and the uncontradicted evidence the Court finds that the allegations of the complaint have been fully proved and that the plaintiff has established a *prima facie* right to a judgment for the amount sued for, to-wit: $2735.52, and interest thereon at the rate of 6% per annum from December 1, 1910, and taxable costs.

There remains to be considered the affirmative defenses pleaded in the defendants' answer. The first of these is that the plaintiff's warrant is not a valid debt of the City which the Treasurer is authorized to pay, because it was issued to satisfy a judgment which is alleged to be void. This is a collateral attack upon the final judgment of a court of superior and general jurisdiction. Lack of jurisdiction of the Court which rendered the said judgment is the only ground upon which such an attack can be successful. By the judgment-roll, a certified transcript of which has been introduced in evidence, it appears that the judgment was rendered in an action regularly commenced and prosecuted against the City of Port Townsend, a municipal corporation of the State of Washington, empowered to sue and defend actions; that the said defend-

ant entered its appearance in the action and demurred to the complaint on the ground that the facts stated therein were insufficient to constitute a cause of action, which demurrer was by the Court overruled; the defendant then announced its determination to stand on its demurrer and to not file any answer or further pleading, and thereupon the judgment was rendered against the City of Port Townsend for the sum of $1523.42, and interest thereon until paid, at the rate of 10% per annum and costs. The City failed to prosecute an appeal or writ of error to have the case reviewed by the Supreme Court of the State, but instead of doing so compromised the case by an agreement with the plaintiff in the action that he should receive a warrant against the indebtedness fund of the City for the amount of his judgment, which warrant should bear interest at the rate of 6% per annum instead of 10% specified in the judgment of the Court. That agreement was fully executed and the warrant for the amount of $1548.12 was issued in full satisfaction of said judgment, that being the warrant which is the basis of the plaintiff's demand in the present action, he being the assignee and owner thereof. The answer alleges and the defendants contend that said judgment is void for the reason that it appears by the complaint that the action was for the collection of money due upon a warrant issued as payment in part for the performance of a contract for street improvements, the cost of which should be provided for by a local assessment against property especially benefited by the improvement, and that the City was not obligated nor authorized to pay for said improvement except from the fund to be provided by a local assessment. It appears, however, by the complaint that the street improvement warrant was not the sole cause of action: the City was sued for damages for the breach of its contract, in that it failed to levy and collect the local assessment required to pay the contractor for the improvement, and by reason of the lapse of time and changed conditions it had become impossible to do so. Upon the authority of the decisions of the Supreme Court of the State in the cases

of Bank of British Columbia v. Port Townsend, 16 Wash. 450; 47 Pac. Rep. 896; and of the Circuit Court of Appeals for the Ninth Circuit in the case of Denny v. Spokane, 79 Fed Rep. 719, the demurrer was properly overruled. But in support of its contention the defendant relies upon decisions of the Supreme Court of the State rendered subsequently to its decision in the case above cited, holding in effect that the cost of street improvements cannot be paid out of money of the City raised by general taxation, if it has not collected the special improvement fund and diverted the same. Potter v. Whatcom, 25 Wash. 207; Soule v. Ocosta, 49 Wash. 518. The question involved is one of law, and is the identical question raised by the demurrer which the Court overruled. The Court had jurisdiction of the parties and of the subject matter in litigation, the judgment entered upon the demurrer was a final judgment, on the merits and the question therefore is *res judicata*. If the decision was erroneous it might have been reversed by a court having appellate jurisdiction, but the judgment is not void, nor vulnerable to a collateral attack in a court of coordinate jurisdiction. 24 Am. & Eng. Enc. of Law (2nd Ed), 709-746-799.

The answer alleges that the plaintiff's warrant is void for the further reason that it was issued pursuant to a resolution of the City Council passed at a special meeting in violation of a law of the State. By the record, however, it appears that said resolution was adopted at an adjourned session of a regular meeting, and not at a special or called meeting of the Council. Moreover, if the Council had not passed the resolution its failure to act at a regular meeting could not affect the validity of the warrant, because the City officials could have been compelled by a writ of mandamus to issue a warrant to satisfy the judgment; therefore the act of the Mayor and City Clerk in issuing the warrant was not unauthorized and the warrant is not void.

The plaintiff's reply put in issue the allegations of the answer constituting the second affirmative defense, and the

defendant has abandoned it by failing to offer any evidence to sustain it.

The third affirmative defense is on the ground that the plaintiff's warrant was issued at a time when the existing indebtedness of the City exceeded the limit of debt which the City could legally incur under the provisions of its charter without special authorization by a popular vote, and it was not so specially authorized. The plaintiff's warrant was issued to satisfy a judgment of a court of competent jurisdiction which conclusively established the validity of the City's obligations to pay the plaintiff in that action the amount which he sued for, and by that judgment the City and its officers are estopped. U. S. v. New Orleans, 98 U. S. 395; State ex rel. Ledger Publishing Co. v. Gloyd, 14 Wash. 5, 24 Am. & Eng. Enc. of Law (2nd Ed.), 766-781.

I direct that findings and a judgment for the plaintiff in accordance with this opinion be prepared and submitted for my signature.

C. H. HANFORD,
United States District Judge.

Indorsed: Memorandum Decision on the Merits. Filed U. S. Circuit Court, Western District of Washington, Dec. 11, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the United States Circuit Court for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA AND THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.
No. 1931.

FINDINGS OF FACT PROPOSED BY DEFENDANTS.

This cause came regularly on for trial on August 29, 1911, the plaintiff appeared by his attorney, J. A. Bentley, Esq., and the defendants appeared by their attorney, U. D. Gnagey. Witnesses were sworn on behalf of both parties and testified and other evidence introduced, and the court took the same under advisement, and now makes the following Findings of Fact:

1.

That the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela, a citizen of the State of Washington, and the defendant The American Surety Company is a corporation of the State of New York.

2.

That the City of Port Townsend is a municipal corporation and a city of the third class in the State of Washington, organized and existing as alleged in the answer of defendants, paragraph one of their first affirmative defense.

3.

That the defendant Charles L. Intermela is the Treasurer of said City of Port Townsend, and has been such ever since the third day of January, 1910, at which time he succeeded himself as treasurer of said city during the full term of that office which commenced on the fifth day of January, 1909; that the American Surety Company was the surety of the said treasurer for the term beginning January 3, 1910, and that the said defendants executed a bond to the City of Port Townsend as alleged in plaintiff's complaint.

4.

That on the 14th day of November, 1897, in the Superior Court of the State of Washington for Jefferson County, in cause No. 1784, wherein Alonzo Elliott was plaintiff and the City of Port Townsend was defendant, a judgment in favor of said plaintiff and against the said defendant for the sum of $1523.42 and costs of suit, upon a complaint a true copy of which is set forth in paragraph two of the first affirmative defense of defendant's answer, was signed by the court and the said judgment was filed with the clerk of the said court on November 16, 1897, and was duly recorded on said day; that a summons and complaint was duly served upon the defendant city in said cause, and the said city appeared by its attorney and demurred to the complaint on the ground that the same does not state sufficient facts to constitute a cause of action; that the said demurrer was overruled by the court and the following is a true copy of the said judgment so rendered in said cause, to-wit:

"In the Superior Court of the State of Washington for Jefferson County.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a Municial Corporation,
Defendant.
No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above-named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorneys for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint, and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint:

Now, therefore, by reason of said premises and the law in such cases made and provided, and upon the application of the above named plaintiff, Alonzo Elliott, it is hereby ordered, adjudged and decreed that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, the City of Port Townsend, the full just sum of $1523.42, and that the said amount draw interest at the rate of 10% per annum from the

date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge."

5.

That on February 14, 1898, the defendant duly appealed from the said judgment to the Supreme Court of the State of Washington by duly serving a notice of appeal and filing the same with the clerk of said Superior Court, together with proof of service, all as required by law.

6.

That at that time and at all the times herein mentioned Ordinance No. 585 of the said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month.

7.

That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock P. M., without stating for what purpose said recess was taken.

8.

That on the following day, February 16, 1898, the said city council met at three o'clock P. M., after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock P. M. of the following day; and at four o'clock P. M. of the following day, that is, on February 17, 1898, the said city council again met and ordered the issuing of the warrant sued on herein.

9.

That on February 18, 1896, in pursuance of said order, the warrant sued on herein and set out in full in plaintiff's complaint, on page four thereof, was issued, and afterwards, on the 19th day of February, 1898, was presented to the city treasurer for payment, and endorsed by said treasurer, all as alleged in said complaint.

10.

That afterwards the said Alonzo Elliott endorsed and transferred the said warrant to the plaintiff, who is now the owner and holder thereof, and was such owner and holder on December 1, 1910.

10.

That at the time the said judgment was so rendered in cause No. 1784, and before the issuance of the said warrant, and before the same was ordered to issue by the city council, there were outstanding about $130,000 of street grade warrants issued on special funds of local improvement districts in said City of Port Townsend; that the said City of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. the City of Port Townsend, cause No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the said City Council of the City of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judgment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants, nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six per cent. interest on the indebtedness fund of said city in satisfaction of such judgments; that long before the city council of

said city entered into said agreement with said street grade warrant holders, and long before the rendition of the said judgment in cause No. 1784 aforesaid, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant issued on a special fund; that notwithstanding said decision, the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause No. 1784, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof, about $100,000 of street grade warrants were reduced to judgment against the said city without proper defense on the part of said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such street grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about $30,000 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on such street grade warrants, and refused to recognize as valid any of the indebtedness fund warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and the city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants as valid obligations against said city, and still refuses to allow any more judgments taken against said city on such street grade warrants.

11.

That at the time said agreement was so made and at the time the said indebtedness fund warrants were so issued and ordered paid by the city council, the said City of Port Townsend

was indebted beyond its constitutional limit of indebtedness for other purposes; that the total assessed valuation of all taxable property in said city according to the assessment for city purposes was $1,541,426 for the year 1897 and $1,532,056 for the year 1898; that the total amount of the indebtedness of said city at all times during said year 1898 was before the issuance of any of the said indebtedness fund warrants, as aforesaid, and at the time of making the said agreement, over the sum of $200,000 exclusive of all of the said indebtedness fund warrants issued all of said remaining street grade warrants, and exclusive of any indebtedness for supplying said city with water, artificial light or sewers; that the said city did not own or control any works for supplying such water, light or sewers before the year 1905; and that the total assets of said city, including the full amount of uncollected taxes, penalties and interest due said city and moneys due from all sources, did not at any time during said year 1898 exceed the total sum of $100,000.

12.

That at no time has the assent of three-fifths of the voters of said city voting at any election been had, in any manner whatever, for the purpose of incurring any part of the said $130,000 street grade warrant indebtedness, or any part of the said indebtedness fund warrant issue, nor has any part of said street grade warrant indebtedness of $130,000, or any part of said indebtedness fund warrant issue of $100,000, ever been in any manner authorized or validated by any of the voters or electors of said city.

13.

That ever since the thirteenth day of September, 1906, city ordinance No. 722, entitled "An Ordinance to define the duties of the City Treasurer of the City of Port Townsend," has been and now is in force, and section nine of said ordinance reads as follows, to-wit "It shall be the duty of the city treasurer to turn into the 'indebtedness fund' all moneys derived by the

city from the County of Jefferson for its share of the proceeds of the sale of any county property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt, into the respective funds of the city, according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council"; that the warrant involved in this suit is one of those warrants which the city treasurer by this ordinance is directed not to pay without a special order of the said city council, and that the said city council never made any order directing the said city treasurer to pay such warrant.

14.

That all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend which have or had preference over the plaintiff's said warrant for payment out of money in the city treasury of said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city prior to the fourth day of January, 1910, and the plaintiff's said warrant stands next in order of number and date after the warrants, certificates and other obligations and indebtedness of said city so as aforesaid called in or paid.

15.

That between the fourth day of January, 1910, and the first day of December, 1910, both inclusive, the said city treasurer received as the city's share of the proceeds of the sale of county property the sum of $4674.69, and that on said first day of December, 1910, the said plaintiff presented his said warrant to the treasurer of said city for payment, and such payment was refused by said treasurer.

16.

That the said city council, in ordering the issuance of the said warrant No. 2 on the indebtedness fund of said city, and the mayor and clerk, in issuing the sum in satisfaction of said judgment in cause No. 1784, acted fraudulently, and the said warrant is fraudulent and void, and was issued without authority of law.

U. D. GNAGEY,
Attorney for Defendant.

Copy of the foregoing proposed findings received and due service thereof accepted this 15th day of December, 1911.

J. A. BENTLEY,
Attorney for Plaintiff.

Indorsed: Findings of Fact Proposed by Defendants. Filed U. S. Circuit Court, Western District of Washington, Dec. 15, 1911. James C. Drake, Clerk. B. O. Wright, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA *et al.*,
Defendants.
No. 1931.

This cause came regularly on for trial by the court, a trial by jury having been waived, on August 29, 1911, the plaintiff appearing by his attorney, J. A. Bentley, and the defendants by their attorney, U. D. Gnagey. Witnesses were sworn and testified on behalf of both the parties, and other evidence in-

troduced. The court took the case under advisement, and the decision thereof having been rendered and entered by the clerk, the court makes special findings of fact as follows:

First: That the plaintiff is a citizen of the State of Massachusetts, the defendant Charles L. Intermela a citizen of the State of Washington, and the defendant The American Surety Company is a corporation of the State of New York, and the matter in dispute in the action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

Second: That the City of Port Townsend is a municipal corporation, a city of the third class, having less than twenty thousand inhabitants, in the County of Jefferson, State of Washington, and the defendant Charles L. Intermela was Treasurer of said City for the term which commenced on January 4, 1910, at that time succeeding himself as Treasurer of said City for the term which commenced on January 5, 1909; and that the defendants executed to the City of Port Townsend for the 1910 term the bond set out in the complaint.

Third: That on the 19th day of August, 1897, the City of Port Townsend was served with a summons and a copy of the complaint in an action for damages for breach of contract in the Superior Court for Jefferson County, State of Washington, in which Alonzo Elliott was plaintiff and the City of Port Townsend was defendant; that said city appeared in said action and demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action; that upon the hearing the court overruled the demurrer and then and there it was announced in open court by the defendant's attorney that the defendant would stand upon its demurrer and would not answer or further plead to the complaint, and thereafter, on the 14th day of November, 1897, judgment for the plaintiff Alonzo Elliott and against the defendant the City of Port Townsend for the sum of $1523.42, and that said amount draw interest at the rate of ten per cent. per annum from that date until paid, besides the costs and disbursements of plaintiff to be taxed, was signed by the judge,

which judgment was filed and entered by the clerk on the 16th day of November, 1887; that on February 14, 1898, the defendant city served the plaintiff Alonzo Elliott with a notice of appeal from said judgment to the Supreme Court of Washington and filed the same with the clerk of the Superior Court, where said judgment was entered, but no further prosecuted said appeal.

Fourth: That a regular meeting of the city council of the City of Port Townsend convened on February 15, 1898, and continued its sessions upon the two succeeding days; that at said meeting the city council agreed with Alonzo Elliott, the plaintiff in whose favor said judgment was rendered, that he should receive a warrant against the indebtedness fund of the city for the amount of his judgment, which warrant should bear interest at the rate of 6% per annum, instead of 10% specified in the judgment of the court; that the warrant set out in the complaint for $1548.12 was issued pursuant to said agreement in full satisfaction of said judgment; and on the 19th day of February, 1898, was presented to the Treasurer of the City of Port Townsend for payment by said Alonzo Elliott and payment thereof refused for want of funds and so endorsed upon the back by said treasurer, and thereafter the said Elliott endorsed and transferred said warrant to the plaintiff.

Fifth: That on December 1, 1910, interest to the amount of $1187.40 had accrued on plaintiff's warrant; that the defendant Intermela had in his hands as Treasurer of the City of Port Townsend on that date more than sufficient money which was applicable to the payment of said warrant to fully pay the same, both principal and interest; that on that day plaintiff presented said warrant to said Intermela at his office and demanded payment thereof, and he refused to pay the same.

C. H. HANFORD, Judge.

Indorsed: Special Findings. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk, by S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA AND THE AMERICAN SURETY COMPANY, a corporation of the State of New York,
Defendants.
No. 1931.

JUDGMENT.

This cause came regularly on for trial by the court without a jury, a trial by jury having been waived by the parties, and was tried on the 29th and 30th days of August, 1911, and taken under advisement, and on the 11th day of December, 1911, the court filed its decision in favor of the plaintiff, that the defendants were jointly and severally indebted to the plaintiff in the sum of twenty-seven hundred and thirty-five dollars and fifty-two cents and interest thereon at the rate of six per cent. per annum from December 1, 1910, and on the 15th day of February, 1912, the said court having made its special findings in said cause, which were filed with the clerk on February 15, 1912;

Now, therefore, it is hereby adjudged that the plaintiff, David Perkins, do recover of and from the defendants, Charles L. Intermela and The American Surety Company, or either of them, the full sum of twenty-nine hundred thirty-three dollars and eighty-four cents, together with his costs and disbursements in this action to be taxed, and that the plaintiff have execution therefor.

Done in open court this 15th day of February, 1912.

C. H. HANFORD, Judge.

Indorsed: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 15, 1912. A. W. Engle, Clerk, by S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA *et al.*,
Defendants.
No. 1931.

EXCEPTION TO ENTRY OF FINDINGS AND JUDGMENT.

The findings and judgment herein having been entered in the absence of the defendants and their counsel, U. D. Gnagey, and without notice, on the 15th day of February, A. D. 1912, and there being attached to said findings and judgment no formal allowance of exception thereto of said defendants, said defendants now in writing hereby except to said findings and judgment and to each and every part thereof.

U. D. GNAGEY,
Attorney for Said Defendants.

The foregoing exception is hereby allowed this February 27, 1912.

C. H. HANFORD, Judge.

Service of the within exception to entry of findings by delivery of a copy to the undersigned is hereby acknowledged this 26th day of February, 1912.

W. M. WATSON,
Attorney for Defendant.

Indorsed: Exceptions to Entry of Judgment and Findings. Filed in the U. S. District Court, Western Dist. of Washington, Feb. 29, 1912. A. W. Engle, Clerk, by S., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA AND THE AMERICAN SURETY COMPANY, a corporation,
Defendants.

MOTION TO REVERSE FINDINGS OF FACT.

Come now the defendants herein, by their attorney, U. D. Gnagey, and respectfully request the court to revise its findings herein signed on the 15th day of February, 1912, so as to make the said findings cover all the issues in the cause and to eliminate from the said findings conclusions of law.

This motion will be based on the record in this cause and on the stenographer's notes taken at the trial and on defendants' proposed findings.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Motion to Revise Findings of Fact. Filed Feb. 23, 1912. A. W. Engle, Clerk, by F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA *et al.*,
Defendants.
No. 1931.

This cause coming on for hearing this 26th day of February, A. D. 1912, upon the motion of defendants herein, by their counsel, U. D. Gnagey, to revise the findings of fact heretofore entered herein on the 15th day of February, A. D. 1912, and to make the special findings of fact heretofore duly requested by said defendants, and said matter being duly presented to the court,

The court here and now refuses all the special findings of fact submitted by defendants, to which refusal of the court defendants except, and their exceptions are hereby allowed.

At the request of the defendants the court modifies the fifth finding of fact heretofore made by the court, so that said fifth finding of fact shall read as follows, to-wit:

That all of the warrants, certificates and other obligations and indebtedness of said City of Port Townsend, which have or had preference over the plaintiff's said warrant for payment out of money in the hands of the city treasurer and said city belonging to the indebtedness fund of said city were called in for payment or had been paid by the treasurer of said city prior to the 4th day of January, 1910, and plaintiff's said warrant stands next in order of number and date after the warrants, certificates and other obligations and indebtedness of said city so, as aforesaid, called in or paid, and that between the 4th day of January, 1910, and the 1st day of December, 1910, both

inclusive, said city treasurer received as the city's share of the proceeds of the sale of property that had been forfeited to the county for non-payment of taxes the sum of $4674.69, and that on said 1st day of December, 1910, said plaintiff presented his said warrant to said treasurer of said city for payment, and such payment was refused by said treasurer. When said money was received by him Ordinance No. 722 of the City of Port Townsend, adopted in the year 1906, was an existing ordinance of said city, the ninth section of which reads as follows:

"It shall be the duty of the city treasurer to turn in to the indebtedness fund all moneys received by the city from the County of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, 'which are described,' and turn in to the respective funds of the city, according to the respective levies therefor, until all the legal outstanding claims against the indebtedness fund shall have been paid; but the city treasurer shall not pay any indebtedness fund warrants, except the general expense, fire, water, light and roads fund warrants, without the special order of the city council."

Done in open court this 2nd day of March, A. D. 1912.

C. H. HANFORD,
United States District Judge.

Indorsed: Order. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 4, 1912. A. W. Engle, Clerk, by S., Deputy.

In the United States District Court for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA *et al.*,
Defendants.

EXCEPTIONS TO SPECIAL FINDING OF FACTS AND TO REFUSAL OF COURT TO MAKE OTHER FINDINGS.

Come now the defendants herein, by their attorney, U. D. Gnagey, and except to the special finding of fact made by the court and to the refusal of the court to make other findings proposed by said defendants, in the following particulars:

First: They except to that portion of the first finding made by the court which states that "the matter in dispute in the action, exclusive of interests and costs, exceeds the sum of two thousand dollars," for the reason that the same is not supported by any evidence in the case and is contrary to the facts shown by the pleadings, which exception is allowed by the court.

Second: Defendants except to that portion of the third finding made by the court, wherein it is found that the action brought by Alonzo Elliott against the City of Port Townsend on the 19th day of August, 1897, was "an action for damages for breach of contract," without specifically stating the nature of the contract, and without making the finding proposed by defendants as to the nature of the suit or action, on the ground that the said finding or portion thereof is not supported by any evidence and is contrary to the admissions of the pleadings in this cause, which exception is allowed by the court.

Third: Defendants except to that portion of the fourth finding made by the court, in which it is found that the regular meeting of the city council held on February 15, 1898, "continued its sessions upon the two succeeding days," for the reason that the said finding is not supported by any evidence in the case, which exception is allowed by the court.

Fourth: Defendants except to the ruling of the court in refusing to find that the City of Port Townsend duly appealed from the judgment in the case of Alonzo Elliott vs. The City of Port Townsend and that such appeal was pending at the time the city council ordered the warrant drawn that is involved in this action, as embodied in their proposed fifth finding, which exception is allowed by the court.

Fifth: Defendants except to the refusal of the court to make the sixth finding proposed by them in regard to the regular meetings of the city council, which exception is allowed by the court.

Sixth: Defendants except to the refusal of the court to make the seventh and eighth findings proposed by them, in regard to the meetings held by said council on the 15th, 16th and 17th of February, 1898, which exception is allowed by the court.

Seventh: Defendants except to the refusal of the court to make the tenth finding proposed by them (second finding marked 10), which exception is allowed by the court.

Eighth: Defendants except to the refusal of the court to make the eleventh finding proposed by them, which exception is allowed by the court.

Ninth: Defendants except to the refusal of the court to make the twelfth finding proposed by them, which exception is allowed by the court.

Tenth: Defendants except to the refusal of the court to make the thirteenth finding proposed by them, which exception is allowed by the court.

Eleventh: Defendants except to the refusal of the court to make the sixteenth finding proposed by them, in regard to the illegality and fraud in the issuance of the warrant involved in this action, which exception is allowed by the court.

All of the exceptions to the rulings of the court to the refusal of the court to make the findings herein referred to are based on the ground that such findings proposed and rejected by the court are shown by the evidence and the pleadings and the stipulations and are material to a proper determination of the said action.

Dated March 11, 1912.

C. H. HANFORD, District Judge.

Indorsed: Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, March 28, 1912. A. W. Engle, Clerk, by S., Deputy.

PLAINTIFF'S EXHIBIT A

Port Townsend, Wash., Feb. 17, 1898.

Upon motion the following resolution was duly passed by the city council:

Whereas, judgment has been duly entered in the Superior Court of the State of Washington for Jefferson County, against the City of Port Townsend, in favor of the following named parties, for the following amounts respectively, to-wit:

Merchants' Bank of Port Townsend		$14,375.28
Manchester Savings Bank		7,788.71
Commercial Bank of Port Townsend		10,324.44
John Barneson		4,587.33
Bank of British Columbia		18,600.15
E. M. Johnson		1,812.23
First National Bank of Port Townsend		7,625.00
E. Heuschober		482.65
Alonzo Elliott	(about)	1,400.00

Together with costs and interest from date of judgments at 10% per annum.

And whereas, the said parties have duly presented the said claims under said judgments against the city to the city council for settlement and payment;

And whereas, it is the opinion of the said council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, therefore, be it resolved by the city council of the City of Port Townsend that said claims and judgments be, and the same are hereby allowed and ordered paid as claims against the said city, and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "indebtedness fund" of said city, which warrants shall be signed by the city

clerk and mayor, and with the city seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same and until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named, on or before February 17 at 3 o'clock P. M.

State of Washington,
City of Port Townsend,
Office of City Clerk.—ss.

The undersigned city clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of an original document and the indorsements thereupon on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal) GEORGE ANDERSON, City Clerk.

Indorsed: Certified Copy of Resolution Exhibit A. Plaintiffs' Exhibit A. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT B

Port Townsend, Wash., Feb. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

GENTLEMEN: We, the undersigned judgment creditors of the said City of Port Townsend, hereby agree to accept and do hereby accept the proposition of the said city and its council, made on the 16th day of February, 1898, to satisfy and pay our respective judgments against the said city by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the "indebtedness fund" of said city, and to bear interest from the date of their issue at the rate of six (6) per cent. per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jefferson County, Washington, upon the receipt of said warrants.

BANK OF BRITISH COLUMBIA, of Victoria ,B. C.
FIRST NATIONAL BANK OF PORT TOWNSEND.
E. M. JOHNSON.
EMIL HEUSCHOBER.

By MORRIS B. SACHS,
Attorney of Record in Said Causes for Said Judgment Creditors.

THE MERCHANTS' BANK OF PORT TOWNSEND.
THE COMMERCIAL BANK OF PORT TOWNSEND.
JOHN BARNESON.
MANCHESTER SAVINGS BANK.

By W. W. FELGER,
Attorney of Record in Said Causes for Said Last Four Mentioned Creditors.

ALONZO ELLIOTT.

By PRESTON, CARR, GILMAN, R. W. JENNINGS,
His Attorneys.

State of Washington,
City of Port Townsend,
Office of City Clerk.—ss.

The undersigned city clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of an original document and the endorsements thereupon on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal) GEORGE ANDERSON, City Clerk.

Endorsed: Certified copy Acceptance of Proposition. Exhibit B. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT C

Port Townsend, Wash., Feb. 15, 1898.

The city council of the City of Port Townsend met in regular session today at 7:30 P. M. at the council chambers. At the call of the roll there were present: The mayor, the city clerk, the city attorney, the city marshal and all of the seven councilmen.

The minutes of the preceding regular meeting were read and approved * * *

Under the call of new business the clerk read notice of attorneys in the street grade warrant cases * * *

After which, on motion, the council took a recess until 3 o'clock P. M., February 16th, 1898.

Port Townsend, Wash., Feb. 16, 1898.

The city council met at 3 o'clock P. M. today, after expiration of recess, in continuation of yesterday's meeting, and after being called to order, the call of the roll showed present his Honor the Mayor, and presiding officer, the city Clerk, the city attorney, and all of the seven members of the council.

Councilman Hastings moved to pay the judgment holders in street grade warrant cases lately decided 5% p. a. interest on the warrants from date of their issue to date of and 6% p. a. on the warrants to be issued in satisfaction of the judgments. This motion was seconded by Councilman Peterson.

Councilman Tanner proposed to amend by making this payment conditional on acceptance by creditors by tomorrow at 3 o'clock P. M.

At the suggestion of Councilman Oliver, attorney for some of said creditors, W. W. Felger then addressed the council, and stated (in effect) that his clients would not accept that proposition, and that he felt quite certain that those represented by Judge Sachs would not do so, either. He believed, however,

that the latter would accept (and he felt positive his clints would) the proposition to issue warrants bearing 6% interest from date of warrant for the amount of judgment.

Councilman Peterson then moved to amend by making warrants pay 6% p. a. interest, and to be issued for amount of judgment.

This was seconded, put to vote and carried.

Councilman Plummer then moved to amend so as to make this conditional on acceptance by 3 o'clock tomorrow. This was also seconded and carried.

A resolution was then drawn up covering exactly the meaning of above, and on motion of Councilman Oliver, seconded by Councilman Peterson, it was adopted.

On motion council then took further recess until 4 o'clock P. M., February 17th, 1898.

Port Townsend, Wash., Feb. 17, 1898.

The City Council of the City of Port Townsend met at 4 o'clock P. M. today at the council chamber, after expiration of recess, and in continuation of the regular meeting of February 15th, 1898.

At the call of the roll there were present his honor the mayor and presiding officer, the city clerk, and all of the seven members of the council.

The Mayor then asked whether any acceptance by judgment holders of the proposition to satisfy judgments in the street grade warrant cases had been filed. This being answered by the clerk affirmatively, said answer was read by him. It was an unconditional acceptance of said proposition by the said holders, as far as represented by Attorneys W. W. Felger and M. B. Sachs.

After this reading Attorney R. W. Jennings made a statement regarding judgment held by Alonzo Elliott, and represented by him. He stated that his clients had a street grade

warrant older than the above others, and also held a judgment prior in time to theirs, but that he had not been notified of this proposition, but had only learned of it this morning. He was also willing to accept said proposition, and asked that his client's name be included in the resolution by which said proposition had been made. After some discussion Councilman Hastings left, being excused on account of pressing business, and the city attorney came in and took his seat.

The Mayor then asked the city attorney whether he had a contract with the city for remuneration on appeal to Supreme Court in the case represented by Attorney Jennings. The city attorney replied that he had such contract, and replied to a question put later on by Councilman Torjuson that in case the city did not appeal the Jennings case the city would owe him nothing on that score.

Councilman Tanner, seconded by Councilman Plummer, then moved that the Jennings judgment be included in said resolution, which was carried.

Councilman Oliver, seconded by Councilman Peterson, then moved that the clerk be instructed to draw warrants according to the resolution, and in denominations such as the respective attorneys might desire. This was carried, after which the council, on motion, adjourned.

D. H. HILL, Mayor.

AUGUST DUDDENHAUSEN, City Clerk.

State of Washington,
City of Port Townsend,
Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of that portion of the record of the proceedings of the City Council of the City of Port Townsend on the fifteenth, sixteenth and seventeenth days of Feb-

ruary, 1898, which relates to street grade warrant cases, judgments therein, and the payment of such judgments.

Witness my hand and the official seal of the City of Port Townsend this——day of May, 1911.

(Seal) GEORGE ANDERSON, City Clerk.

Endorsed: Certified Copy of Proceedings of City Council. Exhibit C. Filed U. S. Circuit Court, Western District of Washington, Sept. 20, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT E

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA AND THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.

STIPULATION.

It is hereby stipulated by the attorneys of the respective parties in the above entitled cause that the printed slips purporting to be copies of the city ordinances of the City of Port Townsend, pasted in the book kept by the city clerk of said city, marked "City Ordinances," are true and correct copies of original ordinances of the City of Port Townsend duly passed by the city council of said city, approved and signed by the mayor thereof, attested by the city clerk and duly published in said City of Port Townsend in a newspaper printed within said city, and that said newspaper was duly designated as the official newspaper of said city. And that said printed copies may be offered and received in evidence upon the trial of the above entitled cause with the same effect by either party thereto, in place and in lieu of the original ordinances they respectively represent, duly recorded by the city clerk, the record of their due passage by the city council of the City of Port Townsend, approval and signing by the mayor of said city, attestation by the city clerk and due publication thereof in the City of Port Townsend.

U. D. GNAGEY.
J. A. BENTLEY,
Attorney for Plaintiff.

Indorsed: Pltfs. Ex. E. Stipulation that printed slips in Ordinance Book be recd. as evidence. Filed U. S. Circuit Court, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

PLAINTIFF'S EXHIBIT H

State of Washington,
County of Jefferson—ss.

N. S. Snyder, being first duly sworn, on oath says: That he is and at all times hereinafter mentioned was a citizen of the United States and of the State of Washington, a resident of the City of Port Townsend in the said state, over the age of 21 years, not interested in but competent to be a witness in the cause mentioned in the annexed summons; that he served the said summons on the defendant the City of Port Townsend, a municipal corporation, in the County of Jefferson, on the 19th day of August, 1897, by then and there delivering to D. H. Hill, as Mayor of said city, a true copy of said summons and therewith a true copy of the complaint in said action.

N. S. SNYDER.

Subscribed and sworn to before me this 19th day of August, 1897.

(L. S.) W. C. DAWSON,
Notary Public in and for the State of Washington,
residing at Port Townsend.

Fees 80c.

In the Superior Court of the State of Washington for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a Municipal Corporation,
Defendan
No. .....

SUMMONS.

The State of Washington to the said The City of Port Townsend, a Municipal Corporation, Defendant:

You are hereby summoned to appear within twenty (20) days after service of this Summons upon you, exclusive of the day of service, and defend the above entitled action in the Court aforesaid; and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff at their office below stated; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, which will be filed with the Clerk of said Court. (A copy of which is herewith served upon you.)

PRESTON, CARR & GILMAN and
R. W. JENNINGS
Plaintiff's Attorneys.

Postoffice address: 304 Pioneer Block, Seattle, King County, Washington.

Indorsed: Original No. 1784. In the Supreme Court of Jefferon County, Washington. Alonzo Elliott, plaintiff, vs. The City of Port Townsend. Summons filed this 19th day of August, 1897, J. N. Laubach, Clerk. Preston, Carr & Gilman, attorneys for plaintiff, Rooms 304 Pioneer Block, Corner of First Ave. and James St., Seattle, Wash.

Copy of Complaint omitted. See Item 18, Praecipe for Transcript.

In the Superior Court of the State of Washington for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND,
Defendant.
} DEMURRER.

Now comes the defendant in the above entitled action and demurs to the complaint of the plaintiff therein for that said complaint does not state facts sufficient to constitute a cause of action.

S. A. PLUMLEY,
Attorney for Defendant,
Port Townsend, Washington.

Indorsed: 1784. Superior Court, Alonzo Elliott vs. The City of Port Townsend. Demurrer filed Nov. 6, 1897, J. N. Laubach, Clerk. By Robt. Biles, Deputy. S. A. Plumley, Atty. for Deft.

In Sup. Court Jefferson County, Wash.

ALONZO ELLIOTT,
Plaintiff,

vs.

THE CITY OF PORT TOWNSEND,
Defendant.

This cause coming on to be heard this 6th day of November, 1897, plaintiff appeared by his attorneys, Preston, Carr and Gilman and R. W. Jennings, and defendant by its duly elected, qualified and acting City Attorney, S. A. Plumley, Esq. After argument the Court orders that said demurrer be and the same is hereby overruled. Defendant excepts. Defendant by its attorney announces in open Court its determination to stand upon its said and not to file any answer or further pleading herein.

Dated Nov. 6, 1897. JAMES G. McCLINTON, Judge."

Indorsed: 1784. Elliott v. Port Townsend. Order overruling Demurrer. Filed Nov. 6th, 1897. J. N. Laubach, Clerk.

DEFENDANT'S EXHIBIT 1

In the Superior Court of the State of Washington for Jefferson County.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a Municipal Corporation,
Defendant.

No. 1874.
JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the Court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open Court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint:

Now, therefore, by reason of said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby order, adjudged and decreed, that the said plaintiff Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of $1523.42 and that the said amount draw interest at the rate of ten per cent per annum from the date

hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open Court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge.

In the Superior Court of the State of Washington, for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a Municipal Corporation,
Defendant.
No. 1784.

State of Washington,
County of Jefferson.—ss.

I, Charles G. Warren, County Clerk of the County of Jefferson, State of Washington, and Ex-Officio Clerk of the Superior Court in and for said County, hereby certify that the foregoing attached twenty-one typewritten pages consecutively numbered 1 to 21 inclusive, contain a true and correct copy of the original summons and complaint and of the whole thereof, in the above entitled action, on file in my office, together with the endorsements thereon and the proof of service thereof; that the foregoing two consecutive typewritten attached pages numbered respectively 22 and 23, contain a true, correct and complete copy of the demurrer to the complaint in said action and of the order of the Court overruling the same on file in my office, together with the endorsements thereupon and the attached typewritten page numbered 24 is a true and correct copy of the

final judgment in said action which was recorded in the order book or journal on the 16th day of November, 1897.

Witness my hand and the Seal of the Superior Court in and for the County of Jefferson, State of Washington, this 5th day of July, 1911.

(Seal) C. G. WARREN,
County Clerk and Ex-Officio Clerk of the Superior Court in and for the County of Jefferson.

Indorsed: Certified Copy of Pleadings and Judgment. Case No. 1931. United States Circuit Court Western District of Washington vs. Plaintiff's Exhibit No. "H." Filed U. S. Circuit Court Western District of Washington, Aug. 29, 1911. Sam'l D. Bridges, Clerk. B. O. Wright, Deputy.

In the Superior Court of the State of Washington, for Jefferson County.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND, a Municipal Corporation,
Defendant.

No. 1784.
JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above named defendant to the complaint of the above named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause

was submitted to the Court for its consideration and determination, and the Court being fully advised in the premises, and good cause appearing therefor, overruled the said demurrer; whereupon the attorney for the said defendant announces in open Court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint;

Now, therefore, by reason of the said premises and the law in such case made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full just sum of $1,523.42, and that the said amount draw interest at the rate of ten per cent. per annum from the date hereof until paid, and the plaintiff's costs and disbursements herein to be taxed.

Done in open Court this 14th day of November, 1897, at 9:30 o'clock of the forenoon of said day.

JAS. G. McCLINTON, Judge.

Indorsed: Filed this 16th day of Nov. 1897, J. N. Laubach, Clerk. Recorded J. 17-P. 37. Ex. D. 34.

In the Superior Court of the State of Washington, in and for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND,
Defendant.

NOTICE OF APPEAL.

To Messrs. Preston, Carr and Gilman and R. W. Jennings, attorneys for the plaintiff in the above entitled action:

Please take notice that the defendant, the City of Port Townsend, hereby appeals to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 16th day of November, 1897, in favor of said plaintiff and against said defendant for the sum of $1,523.42 and costs.

S. A. PLUMLEY,
Defendant's Attorney.

Service of the foregoing notice of appeal admitted this 14th day of February, 1898.

R. W. JENNINGS,
One of Attorneys for Plaintiff.

Indorsed: Filed 14th day of Feb., 1898. J. N. Laubach, Clerk. Recorded J. 17. P. 91.

State of Washington
County of Jefferson—ss.

I, C. G. Warren, Clerk of the Superior Court of the State of Washington, in and for the County of Jefferson, holding terms at Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of the original Judgment and Notice of Appeal and the Admission of Service of said Notice of Appeal in cause No. 1784 of said Court, wherein Alonzo Elliott is Plaintiff and the City of Port Townsend is defendant, as the same appears of record in my office, and I further certify that the said original Judgment was filed in my office on November 16, 1897.

Witness my hand and the seal of said Court this 26th day of August, 1911.

(Seal) C. G. WARREN,
Clerk of said Superior Court.

State of Washington
County of Jefferson—ss.

I, Lester Still, Judge of the Superior Court of the State of Washington in and for the County of Jefferson, do hereby certify that the said Court is a Court of record having general common law jurisdiction; that at the date of the foregoing certificate the said C. G. Warren was the duly elected, qualified and acting Clerk of said Court; that the said certificate is in due form of law, and that the signature appearing to the said certificate is the genuine signature of the said C. G. Warren, as I verily believe.

Witness my hand and the seal of said Court this 28th day of August, 1911.

(Seal) LESTER STILL,
Judge of said Court.

Indorsed: Defendant's Exhibit No. "1." Filed U. S. Circuit Court, Western District of Washington, Aug. 29, 1911, Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

DEFENDANT'S EXHIBIT 2

ORDINANCE NO. 585.

AN ORDINANCE fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing Ordinance No. 470, and all other ordinances on that subject.

The City of Port Townsend does ordain as follows:

Section 1. That the time of meeting of the Common Council of the City of Port Townsend be, and the same is hereby fixed at the hour of eight o'clock P. M., of the first and third Tuesdays of each of the months of April, May, June, July, August, September and October, and at the hour of half past seven o'clock P. M., of the first and third Tuesdays of each of the months of December, January, February and March of each year.

Section 2. That Ordinance No. 470 entitled "An ordinance filing the time of meeting of the Common Council of the City of Port Townsend, and all other ordinances on that subject, be, and the same are hereby repealed.

Section 3. That this ordinance shall take effect and be in force from and after five days from the date of its publication.

Passed by the Common Council November 19, 1895.

Approved by the Mayor, November 21, 1895.

JERRY S. ROGERS, Mayor.

Attest: M. M. SMITH, City Clerk.

Date of Publication, November 24, 1895.

State of Washington
County of Jefferson—ss.

I, George Anderson, City Clerk of the City of Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of Ordinance No. 585 entitled An ordi-

nance fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing Ordinance No. 470 and all other ordinances on that subject, as the same appears in the ordinance book of said City, and as the same was introduced in evidence in the case of David Perkins vs. C. L. Intermela, et al.

Witness my hand and the seal of said City this 13th day of September, 1911.

(Seal) GEORGE ANDERSON, Clerk.

Indorsed: Deft's. Exhibit No. 2. Filed U. S. Circuit Court, Western District of Washington, Sep. 15, 1911. Sam'l D. Bridges, Clerk, B. O. Wright, Deputy.

In the United States Circuit Court, Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES INTERMELA and AMERICAN SURETY COMPANY,
Defendants.

APPEARANCE OF CHARLES E. SHEPARD AND NOTICE.

Now comes Charles E. Shepard, a member of the Bar of this Court, and at the request of both the plaintiff and the plaintiff's present attorney of record, J. A. Bentley, Esq., enters his appearance as one of the attorneys of the plaintiff.

Dated at Seattle, Washington, April 22, 1912.

CHARLES E. SHEPARD.

To Said Defendants and U. D. Gnagey, Esq., their attorney:

You will please take notice that I have entered my appearance as above set forth as an associate attorney with J. A. Bentley, Esq., for the plaintiff and that all papers herein may be served upon me at my office, No. 614 New York Building, Seattle, Washington.

CHARLES E. SHEPARD.

Copy of within appearance and notice received and due service hereby acknowledged this 22d day of April, 1912.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Appearance of Charles E. Shepard and Notice. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,

BILL OF EXCEPTIONS.

Be it remembered that on the 29th day of August, 1911, the above cause came regularly on for trial before Hon. C. H. Hanford without a jury, a jury having been waived by the parties by stipulation duly filed herein. The said plaintiff appeared by his attorney J. A. Bentley, and the said defendants appeared by their attorney U. D. Gnagey. The cause was duly called for trial and the following proceedings were had:

The attorney for the plaintiff made a statement to the court of the nature of the cause and called George Anderson as a witness on behalf of the said plaintiff.

After the said witness was duly sworn and before he gave any testimony, defendants objected to the introduction of any testimony in the case on the ground that it appeared upon the face of the complaint that the court has no jurisdiction, it appearing that the said action is based on a warrant the face value of which is $1584.4.

After argument of counsel for both parties the court overruled the objection for the time being and stated that he would consider the matter further before final judgment, to which ruling of the court defendants took an exception and the exception was duly allowed by the court.

The said witness then testified that he was city clerk of the City of Port Townsend, Washington, and had been such

clerk for four years and seven months. Witness then stated that he had with him the following named papers from the records and documents in his office: A duplicate receipt signed by the defendant Charles Intermela, as Treasurer of the City of Port Townsend, dated January 11, 1909, also other duplicate receipts dated as follows, one dated February 8, 1909, one dated March 11, 1909, one dated July 12, 1909, one dated October 11, 1909, one dated November 10, 1909, one dated December 13, 1909, one dated March 5, 1910, one dated April 9, 1910, one dated May 11, 1910, one dated July 9, 1910, one dated September 16, 1910, and one dated October 11, 1910. He also stated that he had with him the book marked City Ordinances containing the printed slips of the ordinances of the City of Port Townsend, also the record of the proceedings of the meetings of the city council, containing the proceedings of the city council on the 15th, 16th, and 17th, of February, 1898, also the resolution mentioned in these proceedings proposing and directing the issuing of warrants upon the Indebtedness Fund of the City of Port Townsend, also the original acceptance of the proposition signed by the attorneys on behalf of the judgment creditors.

Counsel for plaintiff then offered in evidence the said original resolution, the acceptance of the proposition contained in the resolution, together with the record of the minutes of the city council concerning the same. They were all admitted in evidence without objection, and it was agreed that certified copies of the same be substituted for the originals and the same was accordingly done, and the said exhibits are marked as follows: The resolution dated February 17th, 1898, plaintiff's exhibit "A"; the acceptance of the proposition contained in said resolution, plaintiff's exhibit "B"; and the proceedings of the city council of February 15, 16 and 17, 1898, relating to the same, plaintiff's exhibit "C"; which resolution, acceptance and minutes of the city council are respectively as follows:

Port Townsend, Wash., Feby. 17th, 1898.

Upon motion the following resolution was duly passed by the City Council:

Whereas judgment has been duly entered in the Superior Court of the State of Washington, for Jefferson County, against the City of Port Townsend, in favor of the following named parties, for the following amounts respectively to-wit:

Merchants Bank of Port Townsend	$14,375.28
Manchester Savings Bank	7,788.71
Commercial Bank of Port Townsend	10,324.44
John Barneson	4,587.33
Bank of British Columbia	18,600.15
E. M. Johnson	1,812.23
First National Bank of Port Townsend	7,625.00
E. Heuschober	482.65
Alonzo Elliott	1,400.00 (about)

Together with costs and interest from date of judgments at 10% per annum.

And whereas the said parties have duly presented the said claims under said judgments against the City to the City Council for settlement and payment;

And whereas it is the opinion of the said Council that said claims are a just and legal obligation against the City of Port Townsend and should be satisfied and paid;

Now, therefore, be it resolved by the City Council of the City of Port Townsend that said claims and judgments be and the same are hereby allowed and ordered paid as claims against the said City and that warrants be drawn in the usual form in favor of the said respective parties for the respective amounts of the said judgments, costs and interest, on the "Indebtedness Fund" of said City, which warrants shall be signed by the City Clerk and Mayor and with the City seal attached, and delivered to the said respective parties or their attorneys immediately upon the satisfaction of said judgments of record in the

Superior Court aforesaid, that the above warrants shall draw interest at the rate of 6% per c. p. annum from date of same until paid, and also that this resolution is upon the condition that all of said parties accept the conditions herein named on or before February 17th at 3 o'clock P. M.

State of Washington, City of Port Townsend, Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewritten contains a true and correct copy of an original document and the endorsements thereupon, on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal) GEORGE ANDERSON, City Clerk.

Port Townsend, Wash., Feby. 17, 1898.

To the Mayor and City Council of the City of Port Townsend.

Gentlemen: We the undersigned judgment creditors of the said City of Port Townsend hereby agree to accept and do hereby accept the proposition of the said city and its council, made on the 16th day of February, 1898, to satisfy and pay our respective judgments against the said city by issuing warrants for the full amount of said judgments, interest and costs, said warrants to be drawn on the "Indebtedness Fund" of said city, and to bear interest from the date of their issue at the rate of six (6) per cent. per annum; and hereby agree to cancel said judgments in full of record in the Superior Court of Jefferson County, Washington, upon the receipt of said warrants.

Bank of British Columbia, of Victoria, B. C.
First National Bank of Port Townsend.
E. M. Johnson
Emil Heuschober
By Morris B. Sachs, Attorney of record in said causes for said judgment creditors.

The Merchants Bank of Port Townsend
The Commercial Bank of Port Townsend
John Barneson
Manchester Savings Bank

By W. W. Felger, Attorney of record in said causes for said last four named judgment creditors.

Alonzo Elliott

By Preston, Carr, Gilman, R. W. Jennings, his Attorneys.

State of Washington, City of Port Townsend, Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of an original document and the endorsement thereon, on file in my office.

Witness my hand and the official seal of the City of Port Townsend this 19th day of May, 1911.

(Seal) GEORGE ANDERSON, City Clerk.

Port Townsend, Wash., Feby. 15/98.

The City Council of the City of Port Townsend met in regular session today at 7:30 P. M. at the council chambers. At the call of the roll there were present:—the Mayor, the City Atty. the City Marshall and all of the seven councilmen.

The minutes of the preceding regular meeting were read and approved. * * *

Under the call of new business, the clerk read notice of Atty's. in the street grade warrant cases * * *

After which on motion the council took a recess until 3 o'clock P. M. Feby. 16th, 1898.

Port Townsend, Wash., Feby. 16th, 1898.

The City Council met at 3 o'cl. P. M. to-day, after expiration of recess in continuation of yesterday's meeting, and

after being called to order, the call of roll showed present his Honor the Mayor and Pr. Officer, the City Clerk, the City Atty. and all of the seven members of the Council.

Councilmen Hastings moved to pay the judgment holders in street grade warrant cases lately decided, 5% p. a. interest on the warrants from date of their issue to date of and 6% p. a. on the warrants to be issued in satisfaction of the judgments. This motion was seconded by Councilman Peterson.

Councilman Tanner proposed to amend by making this payment conditioned on acceptance by creditors tomorrow at 3 o'clock P. M.

At the suggestion of Councilman Oliver, attorney for some of the said creditors, W. W. Felger, then addressed the council and stated (in effect) that his clients would not accept that proposition, and that he felt quite certain that those represented by Judge Sachs would not do so either. He believed, however, the latter would accept (as he felt positive his clients would) the proposition to issue warrants bearing 6% interest from date of warrant for the amount of judgment.

Councilman Peterson moved to amend by making warrants pay 6% p. a. interest and to be issued for amount of judgment. This was seconded, put to vote and carried.

Councilman Plummer then moved to amend so as to make this conditional on acceptance by 3 o'clock P. M. tomorrow. This was also seconded and carried.

A resolution was then drawn up covering exactly the meaning of above, and on motion of Councilman Oliver, seconded by Councilman Peterson, it was adopted.

On motion, council then took a further recess until 4 o'clock P. M. February 17th, 1898.

Port Townsend, Feb. 17th, 1898.

The City Council of the City of Port Townsend met at 4 o'clock P. M. today, at the council chamber, after expiration of recess and in continuation of the regular meeting of February 15th, 1898.

At the call of the roll there were present his Honor the Mayor and Presiding Officer, the City Clerk and all of the seven members of the Council.

The Mayor then asked whether any acceptance by judgment holders of the proposition to satisfy judgments in the street grade warrant cases had been filed. This being answered by the clerk affirmatively, said answer was read by him. It was an unconditional acceptance of said proposition by the said holders as far as represented by Attorneys W. W. Felger and M. B. Sachs.

After this reading Attorney R. W. Jennings made a statement regarding judgment held by Alonzo Elliott, and represented by him. He stated that his client had a street grade warrant older than the above others and also held a judgment prior in time to theirs, but that he had not been notified of this proposition, but had only learned of it this morning. He was also willing to accept said proposition, and asked that his client's name be included in the resolution by which said proposition had been made. After some discussion Councilman Hastings left, being excused on account of the pressing business, and the City Attorney came in and took his seat.

The Mayor then asked the City Attorney whether he had a contract with the city for remuneration on appeal to Supreme Court in the case represented by Attorney Jennings. The city attorney replied that he had such contract and replied to a question put later on by Councilman Torgusen that in case the city did not appeal the Jennings case the city would owe him nothing on that score.

Councilman Tanner, seconded by Councilman Plummer, then moved that the Jennings judgment be included in said resolution, which was carried.

Councilman Oliver, seconded by Councilman Peterson, then moved that the clerk be instructed to draw warrants according to the resolution, and in denominations such as the respective

attorneys might desire. This was carried, after which the council, on motion, adjourned.

D. H. HILL, Mayor.

AUGUST DUDDENHAUSEN, City Clerk.

State of Washington,
City of Port Townsend,
Office of City Clerk—ss.

The undersigned City Clerk of the City of Port Townsend hereby certifies that the foregoing annexed typewriting contains a true and correct copy of that portion of the record of the proceedings of the City Council of the City of Port Townsend on the fifteenth, sixteenth and seventeenth days of February, 1898, which relates to street grade warrant cases, judgments therein and the payment of said judgments.

Witness my hand and the official seal of the City of Port Townsend this .....day of May, 1911.

(Seal) GEORGE ANDERSON,
City Clerk.

Counsel for plaintiff then offered in evidence certain receipts signed by the defendant Charles Intermela, City Treasurer, which were produced by the clerk.

Counsel for defendants objected to the introduction of the receipts on the ground that they were not the best evidence, and upon the grounds that they are incompetent, irrelevant and immaterial and do not tend to prove any issues in this cause. Thereupon the following conversation took place between the court and counsel for plaintiff:

THE COURT: These receipts, I understand, are signed by the treasurer; and who are they issued to?

MR. BENTLEY: They are issued to—I will read one of them, and is substantially like all of them: "Received from H. A. Hart, county treasurer, the sum of eight hundred fifty-one dollars and 23-100ths ($851.23) for said city, for city's portion

account of sales collected, in December, 1908; signed, January 11, 1909."

THE COURT: Now, in the ordinary course of business, was this receipt delivered by the city treasurer to the clerk of the city in addition to the county treasurer, or how was that?

MR. BENTLEY: This is through the statute which requires them to deliver to the city clerk a duplicate of the receipt.

THE COURT: This is, then, by the treasurer turned in to the city clerk?

MR. BENTLEY: The city treasurer delivers to the city clerk a duplicate of the one he gives to the county treasurer for the money he receives, and these are the duplicates turned in to the city clerk.

The court then overruled the objection of defendants and they were admitted in evidence, to which ruling of the court defendants took an exception and the same was allowed.

Receipts introduced in one block, marked plaintiff's exhibit "D," and admitted in evidence.

According to the stipulation on file herein, plaintiff offered in evidence section 9 of Ordinance No. 722, entitled "An Ordinance defining the duties of the city treasurer of the City of Port Townsend," and approved on the 4th day of December, 1906, and said section 9 was read in evidence and the same is as follows:

"It shall be the duty of the city treasurer to turn into the indebtedness fund all moneys received by the city from the county of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregrate, immediately upon receipt, into the respective funds of the city according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting

the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council."

The defendant city treasurer then, in response to the requirements of the court, and at the request of counsel for plaintiff, produced certain letters from the county treasurer to the city treasurer and offered each and all of said letters in evidence.

Defendants objected to the introduction of any of these papers in evidence, for the reason that they have not been identified as any official papers belonging to the City of Port Townsend, or of any records of the treasurer's office; and further objected to them on the ground that they are incompetent, irrelevant and immaterial, they not showing the receipt of any moneys belonging to the "indebtedness fund" of said city. The court overruled the objection and defendants took an exception and the exception was allowed by the court. One of the letters was then read, as follows:

"Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants Bank of Port Townsend, Washington, payable to your order for the sum of ($2784.63) Two Thousand, seven hundred eighty-four dollars and sixty-three cents, being in full amount collected by me and due the city of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate, lands and premises	$ 851.23
From year 1904 tax rolls	.96
From year 1905 tax rolls	1.44
1906 tax rolls	8.14
1907 tax rolls	1922.86
Total	$2784.63

Please acknowledge this remittance as usual and oblige,

Yours truly,

(Signed) HARRY A. HART.

Treasurer of Jefferson County, Washington.

The other letters were then read by date and that part which refers to the amount of sales from the property, as follows:

Letter dated February 6, 1909, from sales of county property	$1757.86
Letter March 9, 1909, from sales of county real estate, lands and premises	320.82
May 10, 1909, sales county real estate, lands and premises acquired by tax foreclosure sale and deed situated within the corporate limits of the City of Port Townsend, Washton, during the month of April, 1909, as follows	598.58
Letter July 10, 1909, from sales of county real estate	32.96
Letter June 11, 1909, from sales of county real estate land and premises	38.20
Letter Oct. 8, 1909, from sales of county realty	120.96
Letter Nov. 9, 1909, from sales of county realty	71.11
Letter Dec. 11, 1909, from sales of county realty	20.82
Letter March 4, 1910, from sales of county realty	3616.89
Letter April 8, 1910, from sales of county realty	710.78
Letter July 8, 1910, from sales of county realty	3.30
Letter May 10, 1910, from sales of county realty	77.30

It was admitted by counsel for the respective parties that all of the sales are mere sales of county property that had been acquired by the county by the foreclosure of taxes.

A portion of warrant call No. 23, dated April 15th, 1908, was then offered and read in evidence as follows:

"Notice is hereby given that all outstanding warrants issued by the City of Port Townsend, Washington, drawn on the following funds are now due and payable, namely: General Expense, Fire and Water and Road Fund, issued on or prior to February 2, 1898, total amount outstanding this date, $448.03 (not including interest). Interest ceases on said named warrants on the 31st day of December, 1907. * * *

(Signed) C. L. INTERMELA, City Treasurer.

Date of first publication, April 15, 1908."

It was then admitted by both parties that on December 1, 1910, warrant No. 2, belonging to this plaintiff, was presented to the City Treasurer, the defendant Charles Intermela, at his office in the City of Port Townsend, and payment demanded and payment was refused by defendant Intermela.

On August 31, 1911, after the case had been taken under advisement by the court, the attorneys for the respective parties made a stipulation defining the scope of the above admission, which was filed with the papers on September 11, 1911, for consideration of the court in deciding the case, and is as follows:

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff.

vs.

CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants

No. 1931.

It is hereby stipulated and agreed that the admission of defendants' counsel on the trial to the effect, that warrant No. 2 was presented for payment and payment refused, on December 1, 1910, shall for the purpose of this cause be taken and given effect by the court as also admitting the substance and form of the warrant and the endorsements thereupon to be as alleged in lines 1 to 28 and first five words of line thirty, page 4, of plaintiff's complaint. This stipulation shall not be construed as a waiver of the affirmative defenses nor of either of them, set up in defendant's answer. Nor as a waiver of the right to set up against the plaintiff any defense that might have been set up against the original holder of said warrant.

Dated August 31, 1911.

J. A. BENTLEY,
Plaintiff's Attorney.
U. D. GNAGEY,
Defendant's Attorney.

The plaintiff then read in evidence the amount of the duplicate receipts heretofore identified by the city clerk, to which the defendants made objection on the ground that the same are incompetent, irrelevant and immaterial, the same not

showing that they are for moneys belonging to the indebtedness fund. The court overruled the objection and defendants took an exception which was allowed by the court. The amount of the receipts was read in evidence as follows:

The receipt of January 11, 1909, is for $851.23; February 8, 1909, $1757.86; March 11, 1909, $320.82; July 12, 1909, $327.96; October 11, 1909, $120.96; November 10, 1909, $71.11; December 13, 1909, $20.82; December 31, 1909, $429.80; March 5, 1910, $3616.89; April 9, 1910, $710.78; May 11, 1910, $77.33; July 9, 1910, $3.30; September 10, 1910, $44.47; October 11, 1910, $225.62.

Defendants objected to the introduction of these amounts on the ground that they are incompetent, irrelevant and immaterial. The objection was overruled and exception reserved and allowed.

The plaintiff further to maintain his case introduced in evidence a certified copy of the judgment roll in cause No. 1784 in the Superior Court of the State of Washington for the County of Jefferson, wherein Alonzo Elliott was plaintiff and the City of Port Townsend was defendant, which judgment roll consists of a summons and complaint and proof of service on the Mayor of Port Townsend. Defendant's demurrer to the complaint upon the grounds that it does not state facts sufficient to constitute a cause of action, order overruling the demurrer and final judgment in favor of the plaintiff against the defendant for the sum of $1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date thereof until paid, and the plaintiff's costs and disbursements to be taxed, signed by the judge of the court November 14, 1897.

It was conceded by the attorneys of the respective parties that the copy of the complaint set out in the certified copy of the judgment roll was identical with the copy of the complaint set out in defendant's answer and that in making up the record the complaint as set out in the certified copy of the judgment roll should be omitted, which was approved by the court:

Defendants' counsel objected to the introduction of said certified copy of the judgment roll for the reason that the copy of the final judgment does not show the file mark by the clerk.

The court overruled the objection and defendants excepted to such ruling and the exception was duly noted.

Plaintiff then announced that he rests and thereupon defendants made a motion for a non-suit on the following grounds:

That the plaintiff has not shown as alleged in his complaint or at all that it was the treasurer's duty to pay this warrant.

2. That the plaintiff has not shown that at the time alleged in the complaint, or at any time, the said treasurer had sufficient funds on hand to pay said warrant.

After argument of counsel the court denied the said motion, and defendants excepted to the ruling of the court and the exception was duly noted by the court.

Counsel for defendants then moved for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable.

The court denied the motion and defendants took an exception to the ruling of the court and the exception was duly noted.

Defendants then offered in evidence a certified copy of the judgment in the case of Alonzo Elliott vs. The City of Port Townsend, cause No. 1784, indicating the file mark on the judgment, and also a certified copy of the notice of appeal, together with a certified copy of the proof of service of the notice of appeal and the file mark on it.

Plaintiff objected to the introduction of said record. The court overruled the said objection and noted an exception for the said plaintiff.

Record admitted in evidence and marked defendants' exhibit "1," and the said record is as follows:

In the Superior Court of the State of Washington for Jefferson County.

ALONZO ELLIOTT,
Plaintiff.
vs.
THE CITY OF PORT TOWNSEND,
a Municipal Corporation,
Defendant.
No. 1784.

JUDGMENT.

Be it remembered, that this cause came on duly and regularly for hearing on the 7th day of November, A. D. 1897, upon the demurrer of the above-named defendant to the complaint of the above-named plaintiff, the plaintiff appearing by Robert W. Jennings, one of his attorneys of record, and the defendant appearing by S. A. Plumley, its attorney of record, and after argument of counsel for the respective parties the said cause was submitted to the court for its consideration and determination, and the court being fully advised in the premises, and good cause appearing therefor overruled the said demurrer; whereupon the attorney for the said defendant announces in open court that the said defendant elects to stand upon the said demurrer and refuses to plead further to said complaint; and the said defendant electing to stand upon the said demurrer and failing and refusing to plead further to said complaint.

Now, therefore, by reason of the said premises and the law in such cases made and provided, and upon the application of the above named plaintiff, it is hereby ordered, adjudged and decreed, that the said plaintiff, Alonzo Elliott, have and recover from the above named defendant, The City of Port Townsend, the full sum of $1523.42 and that the said amount draw interest at the rate of ten per cent. per annum from the date

hereof until paid, and the plaintiff costs and disbursements herein to be taxed.

Done in open court this 14th day of November, 1897, at 9:30 o'clock in the forenoon of said day.

JAMES G. McCLINTON, Judge.

(Endorsed) Filed this 16th day of Nov., 1897.

J. N. LAUBACH, Clerk.

Recorded J 17, p. 37, Ex. D 34.

In the Superior Court of the State of Washington in and for the County of Jefferson.

ALONZO ELLIOTT,
Plaintiff,
vs.
THE CITY OF PORT TOWNSEND,
Defendant.

NOTICE OF APPEAL.

To Messrs. Preston, Carr and Gilman and R. W. Jennings, attorneys for the plaintiff in the above entitled action.

Please take notice that the defendant, The City of Port Townsend, hereby appeals to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 16th day of November, 1897, in favor of said plaintiff and against said defendant for the sum of $1523.42.

S. A. PLUMLEY,
Defendant's Attorney.

Service of the foregoing notice of appeal admitted this 14th day of February, 1898.

R. W. JENNINGS,
One of Attorneys for Plaintiff.

(Endorsed) Filed 14th day of February, 1898.
J. N. LAUBACH, Clerk.

Recorded J 17, P. 91.

State of Washington,
County of Jefferson.—ss.

I, C. G. Warren, Clerk of the Superior Court of the State of Washington in and for the County of Jefferson, holding terms at Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of the original judgment and notice of appeal and the admission of service of said notice of appeal in cause No. 1784 of said court, wherein Alonzo Elliott is plaintiff and the City of Port Townsend is defendant, as the same appears of record in my office, and I further certify that the said original judgment was filed in my office on November 16, 1897.

Witness my hand and seal of said court this 26th day of August, 1911.

(Seal of Court) C. G. WARREN,
Clerk of Said Superior Court.

State of Washington,
County of Jefferson.—ss.

I, Lester Still, Judge of the Superior Court of the State of Washington in and for the County of Jefferson, do hereby certify that the said court is a court of record having common law jurisdiction; that at the date of the foregoing certificate the said C. G. Warren was the duly elected, qualified and acting clerk of said court; that the said certificate is in due form of law, and that the signature appearing to the said certificate is the genuine signature of the said C. G. Warren, as I verily believe.

Witness my hand and the seal of said court this 28th day of August, 1911.

(Seal of Court) LESTER STILL,
Judge of said Court.

Mr. George Anderson, city clerk, was called to the witness stand and upon being questioned referred to the ordinance in the Ordinance Book providing for the regular meetings of the City Council, the said ordinance being ordinance No. 585.

The said ordinance was admitted in evidence without objection and a certified copy thereof ordered to be substituted by the court and such copy marked defendants' exhibit "2," which said ordinance reads as follows:

"An ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, and repealing ordinance No. 4&0, and all other ordinances on that subject.

The City of Port Townsend does ordain as follows:

Section 1. That the time of meeting of the Common Council of the City of Port Townsend be and the same is hereby fixed at the hour of eight o'clock P. M. of the first and third Tuesdays of each of the months of April, May, June, July, August, September and October, and at the hour of half past seven o'clock P. M. of the first and third Tuesdays of each of the months of November, December, January, February and March of each year.

Section 2. That ordinance No. 470, entitled An ordinance fixing the time of meeting of the Common Council of the City of Port Townsend, and all other ordinances on that subject, be and the same are hereby repealed.

Section 3. That this ordinance shall take effect and be in force from and after five days from the date of its publication.

Passed by the Common Council November 19, 1895.

Approved by the Mayor November 21, 1895.

JERRY S. ROGERS, Mayor.

Attest: M. M. SMITH, City Clerk.

Date of publication, November 24, 1895.

State of Washington,
County of Jefferson.—ss.

I, George Anderson, City Clerk of the City of Port Townsend, Washington, do hereby certify that the foregoing is a full, true and correct copy of ordinance No. 585, entitled "An ordinance fixing the time of meeting of the common council of the City of Port Townsend, and repealing ordinance No. 470 and all other ordinances on that subject, as the same appears in the ordinance book of said city, and as the same was introduced in evidence in the case of David Perkins vs. C. L. Intermela et al.

Witness my hand and the seal of said city this 13th day of September, 1911.

(Seal) GEORGE ANDERSON,
City Clerk.

It was admitted by counsel that no special order of the city council was ever made authorizing or directing the said defendant treasurer to pay the warrant involved in this section.

Defendants then rested and plaintiff announced that he had no further evidence in rebuttal.

Defendants then renewed their motion for a non-suit on the following grounds:

That the evidence does not show that at the time alleged in the complaint or at any time, it became the duty of the city treasurer to pay this warrant.

2. That the evidence does not show that at the time alleged in the complaint or at any time the treasurer had sufficient funds in his possession properly applicable to the payment of this warrant to pay the same.

The motion was denied, an exception taken by the defendants and the exception duly noted by the court.

The defendants then and there upon the submission of the cause to the court for decision requested the judge who tried the same to make special findings of fact, which said request was granted.

In the U. S. District Court,
Western District of Washington.—ss.

Inasmuch as the proceedings, evidence, objections, rulings and exceptions contained in the foregoing bill do not appear on record in this cause, I, C. H. Hanford, Judge of the said Court, who tried the said cause, after due notice given to the plaintiff in said cause as required by law and the rules of court, have settled and signed and do hereby settle and sign said bill of exceptions and have ordered and do hereby order the same to be made a part of the record in this cause. I further certify that the foregoing is a true bill of exceptions; that the matters and proceedings embodied therein are matters and proceedings occurring in the said cause and the same are hereby made part of the record herein; and that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record herein, and I further certify that the same contains all the evidence introduced at the trial of said cause.

Witness my hand this 22d day of April, 1912.

C. H. HANFORD,
Judge of the said District Court.

Copy of the foregoing received and service thereof accepted this 22d day of April, 1912.

J. A. BENTLEY and
CHARLES E. SHEPARD,
Attorneys for Plaintiff.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.

AT LAW—PETITION FOR WRIT OF ERROR.

And now come Charles L. Intermela and The American Surety Company, defendants herein, and say that on or about the 15th day of February, 1912, this court entered judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of these defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore these defendants pray that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.
No. 1931.

ASSIGNMENT OF ERRORS.

The defendants in this action above named in connection with their petition for a writ of error, make the following assignment of errors which they aver occurred upon the trial of the cause, to-wit:

1. The court erred in denying defendants' motion to make paragraph six of plaintiff's complaint more definite and certain by stating the facts which plaintiff claims made it the duty of the city treasurer to pay the warrant in this action and by stating the time when it so became the duty of said treasurer.

2. The court erred in overruling defendants' objection to the jurisdiction of the court, on the ground that the amount in controversy exclusive of interest and cost is less than two thousand dollars, the complaint showing that the action is on a warrant the face value of which is $1548.12.

3. The court erred in admitting in evidence the duplicate receipts of the city treasurer on file in the office of the city clerk, designated as plaintiff's exhibit "D," showing the receipt from the county treasurer of Jefferson County by the city treasurer of the city's portion of the proceeds of the sale of county property, one of which said receipts was read in evidence and is as follows:

"Received from H. A. Hart, County Treasurer, the sum of eight hundred fifty-one dollars and 23-100ths ($851.23) for said city, for city's portion account of sales collected, in December, 1908; signed, January 11, 1909."

4. The court erred in admitting in evidence the letters of the county treasurer of Jefferson County to the defendant Intermela as city treasurer, accompanying remittances of money from the county treasurer to the city treasurer, one of which was read in evidence and is as follows, the others being read simply by date and that portion referring to proceeds of sales of county property, to-wit:

"Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants Bank of Port Townsend, Washington, payable to your order for the sum of ($2784.63) two thousand, seven hundred eighty-four dollars and sixty-three cents, being in full amount collected by me and due the City of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate lands and premises	$ 851.23
From year 1904 tax rolls	.96
From year 1905 tax rolls	1.44
1906 tax rolls	8.14
1907 tax rolls	1922.86
Total	$2784.63

Please acknowledge this remittance as usual and oblige.

Yours truly,

(Signed) HARRY HART,

Treasurer of Jefferson County, Washington."

5. The court erred in admitting in evidence the certified copy of the judgment roll in the case of Alonzo Elliott vs. The

City of Port Townsend, cause No. 1784, of the Superior Court of the State of Washington for Jefferson County, plaintiff's exhibit "H."

6. The court erred in denying defendants' motion for a non-suit at the close of plaintiff's testimony on the ground that plaintiff has not shown as alleged in his complaint or at all that it was the treasurer's duty to pay the warrant in suit.

7. The court erred in denying defendant's motion for a non-suit at the close of plaintiff's testimony on the ground that the plaintiff has not shown that at the time alleged in his complaint, or at any time, the said treasurer had sufficient funds on hand to pay the said warrant.

8. The court erred in denying defendants' motion at the close of plaintiff's testimony for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable.

9. The court erred in denying defendants' motion for a non-suit at the close of all the testimony on the ground that the evidence does not show that at the time alleged in the complaint or at any time it became the duty of the city treasurer to pay the warrant in suit.

10. The court erred in denying defendants' motion for a non-suit at the close of all the testimony on the ground that the evidence does not show that at the time alleged in the complaint or at any time the treasurer had sufficient funds in his possession properly applicable to the payment of the said warrant to pay the same.

11. The court erred in making the finding that the matter in dispute in the action, exclusive of interest and costs, exceeds the sum of two thousand dollars.

12. The court erred in finding that the action brought by Alonzo Elliott against the City of Port Townsend on the 19th day of August, 1897, in the Superior Court of the State of Washington for the County of Jefferson, being cause No. 1784 of said court, was "an action for damages for breach of con-

tract," without specifically stating that said suit was on a street grade warrant drawn on a special fund of a local improvement district in said city.

13. The court erred in making that portion of the fourth finding of fact in which it is found that the regular meeting of the city council, held on February 15, 1898, continued its sessions upon two succeeding days.

14. The court erred in refusing to find that the City of Port Townsend duly appealed to the Supreme Court of the State of Washington from the judgment in the case of Alonzo Elliott against the City of Port Townsend, cause No. 1784 of said court, and that such appeal was pending at the time the city council ordered the warrant drawn that is involved in this action in satisfaction of the judgment in said cause.

15. The court erred in refusing to make the sixth finding proposed by the defendants which reads as follows:

"That at the time and at all the times herein mentioned ordinance No. 585 of the said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month."

16. The court erred in refusing to make the seventh finding proposed by the defendants, which reads as follows:

"That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock P. M., without stating for what purpose said recess was taken.

17. The court erred in refusing to make the eighth finding proposed by the defendants, which reads as follows:

"That on the following day, February 16, 1898, the said city council met at three o'clock P. M., after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock P. M. of the following day; and at four o'clock P. M. of the following day, that is February 17, 1898, the said city

council again met, and ordered the issuing of the warrant sued on herein.

17. The court erred in refusing to make the tenth finding proposed by the defendants (second finding marked 10), which reads as follows:

"That at the time the said judgment was so rendered in cause No. 1784, and before the issuance of the said warrant, and before the same was ordered to issue by the city council, there were outstanding about $130,000 of street grade warrants issued on special funds of local improvement districts in said City of Port Townsend; that the said City of Port Townsend duly appealed from the judgment rendered against it in said cause of Alonzo Elliott vs. The City of Port Townsend, cause No. 1784, but before the record in said cause was sent to the Supreme Court for review, and long before the time expired within which said cause could be reviewed by said court, the said City Council of the City of Port Townsend entered into an agreement with the holders of all of said street grade warrants, including the holder of the warrant reduced to judgment in said cause No. 1784, agreeing that the said city would not defend actions brought on street grade warrants nor appeal from judgments rendered on such warrants nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered, including the judgment rendered in said cause No. 1784, by issuing warrants bearing six per cent. on the indebtedness fund of said city in satisfaction of such judgments; that long before the city council of said city entered into said agreement with said street grade warrant holders, and long before the rendition of the judgment in said cause No. 1784 aforesaid, the Supreme Court of the State of Washington had decided that under no circumstances can a city be held liable on a street grade warrant issued on a special fund; that notwithstanding said decision, the city council of said city entered into said agreement, and in furtherance of said agreement and in compliance therewith, the said city council abandoned the said appeal from the judgment in said cause

No. 1784, and voluntarily ordered the issuance of the warrant described in plaintiff's complaint in satisfaction of said judgment; that under the said agreement and in pursuance thereof about $100,000 of street grade warrants were reduced to judgment against the said city without proper defense on the part of the said city, and indebtedness fund warrants bearing six per cent. interest issued in satisfaction of such judgments; that after said amount of such street grade warrants had been so reduced to judgment and indebtedness fund warrants issued in satisfaction thereof, and while there were still outstanding about $30,000 of such street grade warrants not reduced to judgment, and on or about January 3, 1899, the said city council of said city repudiated and abandoned the said agreement and refused to allow any more judgments taken against the city on such street grade warrants, and refused to recognize as valid any of the indebtedness fund warrants issued in pursuance of said agreement and in satisfaction of such judgments, interest and costs, against said city, and the city council of said city has ever since refused and does now refuse to recognize any of said indebtedness fund warrants as valid obligations against said city, and still refuses to allow any more judgments taken against said city on such street grade warrants.

18. The court erred in refusing to make the eleventh finding proposed by the defendants, wherein it is found that at the time the said agreement was so made and the said indebtedness fund warrants so issued, including the said warrant of plaintiff herein, the said City of Port Townsend, was indebted beyond its constitutional limit of indebtedness for other purposes, and exclusive of the said warrants, and exclusive of the warrant of plaintiff.

19. The court erred in refusing to make the twelfth finding proposed by the defendants, in which it is found that at no time has the matter of validating the indebtedness so contracted ever been submitted to the voters of said city, and that such voters have never ratified the same.

20. The court erred in refusing to make the thirteenth finding proposed by the defendants, which reads as follows:

"That ever since the 13th day of September, 1906, city Ordinance No. 722, entitled 'An Ordinance to define the duties of the city treasurer of the City of Port Townsend,' has been and now is in force, and section 9 of said ordinance reads as follows, to-wit:

"It shall be the duty of the city treasurer to turn into the indebtedness fund all moneys derived by the city from the County of Jefferson for its share of the proceeds of the sale of any county property, and all moneys from city taxes, penalty and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years, which he shall segregate, immediately upon receipt, into the respective funds of the city according to the respective levies therefor, until all the legal outstanding claims against the 'indebtedness fund' of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants, without the special order of the city council; that the warrant involved in this suit is one of those warrants which the city treasurer by this ordinance is directed not to pay without a special order of the said city council, and that the said city council never made any order directing the said city treasurer to pay such warrant."

21. The court erred in refusing to make the sixteenth finding proposed by the defendants, which reads as follows:

"That the said city council, in ordering the issuing of the said warrant No. 2 on the indebtedness fund of said city, and the mayor and clerk in issuing the same in satisfaction of said judgment in cause No. 1784, acted fraudulently, and the said warrant is fraudulent and void and was issued without authority of law."

22. The court erred in holding that the Superior Court of Jefferson County, Washington, had jurisdiction in the case of Alonzo Elliott against the City of Port Townsend to render

the judgment it did render on the cause of action set forth in the complaint in said action.

23. The court erred in not holding that the warrant in suit is void because issued at an adjourned meeting of the city council, and not at a regular meeting of said council, as required by the laws of the State of Washington.

24. The court erred in not holding that the said warrant was one of a series of warrants all of which were over issued, that is, issued when the city was beyond its constitutional debt limit.

25. The court erred in not holding that the warrant in suit was issued under such circumstances and at such a time as to make it a fraud against the City of Port Townsend and against the taxpayers of said city, as a matter of law.

26. The court erred in not giving judgment in favor of the defendants.

U. D. GNAGEY,
Attorney for Defendants.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.

ORDER ALLOWING WRIT OF ERROR.

This 24th day of April, 1912, came the defendants, by their attorney, and filed herein and presented to the court their petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the defendants' giving a bond according to law in the sum of forty-five hundred dollars, which shall operate as a supersedeas bond.

C. H. HANFORD, District Judge.

Indorsed: Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. April 24, 1912. A. W. Engle, Clerk. By S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.
No. 1931.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Charles L. Intermela and The American Surety Company as principals, and The United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto the defendant in error, David Perkins, in the full and just sum of forty-five hundred ($4500) dollars, to be paid to the said defendant in error David Perkins, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 24th day of April, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said court between David Perkins, plaintiff, and Charles L. Intermela and The American Surety Company, a corporation of New York, defendants, a judgment was rendered against the said Charles L. Intermela and The American Surety Company, and the said Charles L. Intermela and The American Surety Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to re-

verse the judgment in the aforesaid suit, and a citation directed to the said David Perkins citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said circuit, on the 24th day of May next:

Now, the condition of the above obligation is such that if the said Charles L. Intermela and The American Surety Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

CHARLES L. INTERMELA. (SEAL)
THE AMERICAN SURETY CO.
By U. D. GNAGEY, Its Attorney.
UNITED STATES FIDELITY & GUARANTY CO.
By JOHN C. McCOLLISTER, Attorney in Fact.

Approved by

C. H. HANFORD, District Judge. (SEAL)

Indorsed: Bond on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the Above Entitled Court:

Please make a transcript of the record in the above cause embracing the following papers for a review of the cause by writ of error from the United States Circuit Court of Appeals:

1. Complaint.
2. Appearance of U. D. Gnagey as attorney for defendants.
3. Motion to make complaint more definite and certain.
4. Order denying motion.
5. Answer of defendants.
6. Reply of plaintiff.
7. Stipulation waiving jury.
8. Stipulation relating to the introduction in evidence of city ordinances.
9. Order made on motion of plaintiff for a rule on defendant Charles L. Intermela to produce certain papers on the trial of the cause.
10. Memorandum decision on the merits.
11. Findings proposed by defendants with acceptance of service of copy of same.
12. Findings made by the court.

13. Judgment.
14. Exception to entry of judgment.
15. Motion to revise findings.
16. Order on motion to revise findings.
17. Exceptions to the special findings made by the court and the refusal of the court to make other findings.
18. Copy of all exhibits, omitting copy of complaint in plaintiff's exhibit....., according to agreement of counsel and approval of court. (See bill of exceptions, p. 14.)
19. Appearance of Charles E. Shepard as one of the attorneys for plaintiff.
20. Bill of exceptions.
21. Petition for writ of error.
22. Assignment of errors.
23. Order allowing writ and fixing supersedeas.
24. Bond on writ of error.
25. Writ of error.

Citation and admission of service.

Besides the foregoing you are to return the original writ of error and the original citation, with the admission of service and a copy of this praecipe.

U. D. GNAGEY,

Attorney for Defendants, Plaintiffs in Error.

Indorsed: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington, April 26, 1912. A. W. Engle, Clerk, by S., Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

DAVID PERKINS,
Plaintiff and Defendant in Error,
vs.
CHARLES L. INTERMELA and THE AMERICAN SURETY COMPANY, a Corporation of the State of New York,
Defendants and Plaintiffs in Error.
} No. 1931.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, A. W. Engle, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 131 printed pages, numbered from 1 to 131, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by the praecipe of the attorney for the defendants and plaintiffs in error, as the same remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the writ of error received and filed in the office of the clerk of the said District Court on April 24, 1912.

I further certify that I annex hereto and herewith transmit the original writ of error and citation in said cause.

I further certify that the cost of preparing and certifying the foregoing return to writ of error is the sum of $168.20, and that the said sum has been paid to me by U. D. Gnagey, Esq., of counsel for defendants and plaintiffs in error.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said district, this 20th day of June, 1912.

(SEAL) A. W. ENGLE, Clerk.

The United States Circuit Court of Appeals for the Ninth Circuit.

The United States of America,
Ninth Judicial Circuit—ss.

The President of the United States to the Honorable Judge of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you or some of you, between David Perkins, plaintiff, and Charles L. Intermela and the American Surety Company, defendants, a manifest error hath happened, to the great damage of the said Charles L. Intermela and the American Surety Company, defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said circuit, on the 24th day of May next, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, this 24th day of April, A. D. 1912,

and in the one hundred and thirty-sixth year of the independence of the United States of America.

Allowed by C. H. HANFORD,
United States District Judge.

Attest: A. W. ENGLE,
(SEAL) Clerk of the District Court of the United States, Western District of Washington.

By F. A. SIMPKINS, Deputy.

Service of the within writ of error by delivery of a copy to the undersigned is hereby acknowledged this 24th day of April, 1912.

J. A. BENTLEY AND
CHARLES E. SHEPARD,
Attorneys for Defendant in Error.

Indorsed: No. 1931. In the District Court of the United States for the Western District of Washington, Northern Division. David Perkins vs. Charles L. Intermela and The American Surety Company. Writ of Error filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

United States of America.

The President of the United States to David Perkins and to J. A. Bentley and Charles E. Shepard, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington,

Northern Division, wherein Charles L. Intermela and The American Surety Company, a corporation of the State of New York, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 24th day of April, A. D. 1912, and of the independence of the United States the one hundred and thirty-sixth.

(Seal) C. H. HANFORD,
United States District Judge.

Attest: A. W. ENGLE, Clerk.

F. A. SIMPKINS, Deputy.

I hereby, this 24th day of April, 1912, accept due personal service of this citation on behalf of David Perkins, defendant in error, and J. A. Bentley.

CHARLES E. SHEPARD,
One of the Attorneys for said Defendant in Error.

Indorsed: No. 1931. In the District Court of the United States for the Western District of Washington, Northern Division. David Perkins vs. Charles L. Intermela and the American Surety Company. Citation. Filed in the U. S. District Court, Western Dist. of Washington, April 24, 1912. A. W. Engle, Clerk, by S., Deputy.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and AMERICAN SURETY COMPANY, (Defendants),
Plaintiffs in Error,
—*vs.*—
DAVID PERKINS (Plaintiff),
Defendant in Error.

No. .....

BRIEF OF PLAINTIFFS IN ERROR

U. D. GNAGEY,
Attorney for Plaintiffs in Error.
L. B. STEADMAN,
Of Counsel for Plaintiffs in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington
Northern Division

STATEMENT OF CASE.

This is an action at law brought by the defendant in error, David Perkins, as plaintiff below against the plaintiffs in error, Charles L. Intermela and the American Surety Company.

As the record frequently refers to the parties as plaintiff and defendants as they appear in the lower court, the parties will be designated in this brief as they appear in the pleadings in the lower court, unless they are expressly designated as plaintiffs in error or defendant in error as the case may be.

Charles L. Intermela, one of the defendants, was during certain times mentioned in the complaint, treasurer of the City of Port Townsend, Washington, and the other defendant, American Surety Company, was surety on his official bond as such treasurer. The plaintiff is the holder of a certain warrant of the City of Port Townsend, drawn on the Indebtedness Fund of said city, the face value of which is $1548.12. This action was brought against the said treasurer and his surety for failure to pay the said warrant when it was presented on December 1, 1910, the plaintiff claiming that at that time he had sufficient funds on hand to pay the same, and that long prior thereto it became the duty of the said treasurer to pay it, and that he refused to make such payment.

After making a motion to make the complaint more definite and certain in regard to the general allegation that long prior to December 1, 1910, it became the duty of the said treasurer to pay said warrant, and

also to make the said complaint more definite and certain in other respects, and the denial of the said motion by the court, the defendants answered, admitting all the allegations of the complaint from the beginning down to and including the copy of the bond as set out in said complaint (Transcript, p. 4), and denying each and every other allegation of the complaint. Thus, the defendants, by their answer, denied among other allegations the allegation that the treasurer had at any time sufficient funds on hand to pay the said warrant, and the allegation that at any time it became the duty of said treasurer to pay the same. This answer also sets up three affirmative defenses (Transcript, pp. 11 to 36). The answer is very long because it sets up a long complaint in a former action which resulted in the judgment in satisfaction of which the warrant in suit was issued.

The first of these defenses challenges the jurisdiction of the court in such former suit to render the judgment it did render on the cause of action therein attempted to be set forth, and also challenges the legality of the warrant on the ground that it was not ordered at a regular meeting of the council as required by law.

The second affirmative defense interposes the statute of limitations.

The third affirmative defense sets forth in full the circumstances under which the warrant in suit was issued, raises the constitutional limit of indebtedness, and sets forth a state of facts which defendants claim shows

that the warrant was issued in fraud of the taxpayers of said city.

The plaintiff replied, denying some of the matters set up in these affirmative defenses, and thus the issues were made up.

Broadly and generally speaking, the issues in the case are as follows:

1. Whether at the time mentioned in the complaint or at all, it was the duty of the city treasurer to pay the said warrant, that is, the warrant in suit.

2. Whether on December 1, 1910, the time the warrant was presented for payment the last time, the said treasurer had sufficient funds on hand applicable to the payment of said warrant to pay the same.

3. Whether plaintiff's warrant is a legal obligation against the city, and such a warrant as the city treasurer would under any circumstances be compelled to pay.

The warrant in suit arose as follows: On October 15, 1888, the City of Port Townsend, Washington, entered into an agreement, pursuant to law and the ordinances of the city, with one W. C. Williams for the grading of a certain portion of Washington street in said city of Port Townsend, and agreed to pay said Williams for the said grading in warrants drawn on the Washington Street Improvement Fund. The grading was done under said contract, and in payment of said work, among others, a warrant for the sum of $1000 was drawn on said fund on February 11, 1889, and delivered to said Williams. Nothing was paid on

this warrant except the interest on the same to August 12, 1892.

Thereafter Alonzo Elliott became the owner of the warrant and on August 19, 1897, he commenced suit in the Superior Court of the State of Washington for Jefferson County against the City of Port Townsend on the same. The city interposed a demurrer to the complaint in the action and such demurrer was overruled by the court, and the defendant electing to stand upon its demurrer and refusing to plead further, a judgment against it in favor of the plaintiff, Alonzo Elliott, in the sum of $1523.42 and costs of suit was rendered and entered on November 16, 1897. The judgment was made to bear ten per cent interest, the same interest the street grade warrant bore. The complaint in this action is set out in full in defendants' first affirmative defense (Transcript, pp. 12 to 32). The warrant sued on in this case of Alonzo Elliott against the city was drawn on the Washington Street Improvement Fund. In other words, it was, as the record plainly shows, what is familiarly known as a street grade warrant. The grading contract and the ordinances under which it was made, and also the ordinances under which the grading was done and also those under which the special assessments were made, are all fully set out in this complaint, a true copy of which is contained in the answer in this case as stated before.

The Supreme Court of the State of Washington, on July 9, 1897, in the case of *The German American*

Savings Bank vs. The City of Spokane, 17 Wash. 315, decided that under no circumstances can a city be held liable on a street grade warrant.

The City of Port Townsend duly appealed from the judgment rendered against it in the said case of *Alonzo Elliott vs. The City of Port Townsend*, by serving and filing a notice of appeal on February 14, 1898, but before anything further was done in the matter of the appeal, the city council abandoned the same, and agreed to issue and did issue a warrant drawn on the Indebtedness Fund of said city in satisfaction of the judgment appealed from, and the warrant so issued is the warrant involved in this suit.

At the same time the city council issued this warrant, they also issued other warrants drawn on the Indebtedness Fund in a large amount in satisfaction of other judgments obtained against the city by other street grade warrant holders. These judgments in satisfaction of which all these warrants were issued on the Indebtedness Fund were never carried to the Supreme Court of the state, and in this way about $100,000 in warrants, face value, were issued on such Indebtedness Fund.

The record also shows that the assessed valuation of the City of Port Townsend for the year 1897 was $1,541,426, and for the year 1898, $1,532,056, and that before the issuing of the same and excluding all of them, and excluding the street grade warrants, which according to former decisions were not to be included in calculating the indebtedness of the city, the City of

Port Townsend was already indebted beyond its constitutional limitations, based on the above valuations.

All the street improvement funds were raised by special assessments levied on the property abutting on the street improvements, according to law and the ordinances of the city. The Indebtedness Fund of the city was created by the act of the legislature of 1897, and according to its express provisions, took effect February 1, 1898. This Indebtedness Fund may be supplied by general taxation, and certain moneys coming from certain delinquent taxes were also to be placed in this fund. That part of the act which is necessary to a decision of this case will be set forth in full hereafter.

It will thus be seen that by the process of obtaining judgments on these street grade warrants and satisfying these judgments by warrants issued on the Indebtedness Fund of said city, street grade warrants which were not a liability against the city as such were converted into an indebtedness against the city on the face of the record.

A stipulation was signed by the parties and placed on file waiving a jury (Transcript, p. 43) and the cause was tried by the court without a jury. When the cause was submitted to the court for decision, defendants requested that special findings be made and in compliance with such request the court made such special findings.

Defendants proposed special findings, and the court

afterwards in the absence of the defendants made and signed findings and the judgment. Defendants, deeming that the findings made by the court did not cover all the issues in the case, made a motion to revise the same. Upon the hearing of such motion the court denied the same generally, but modified the fifth finding and made the same read as it appears in the record on pages 65 and 66.

SPECIFICATIONS OF ERROR.

I. The court erred in overruling defendants' objection to the jurisdiction of the court on the ground that the amount in controversy, exclusive of interest and costs, is less than two thousand dollars, and erred in finding that the amount in dispute exclusive of interest and costs exceeds the sum of two thousand dollars. (Assignment of errors Nos. 2 and 11, Record, pp. 115, 117.)

II. The court erred in admitting in evidence the duplicate receipts filed with the city clerk by the city treasurer. These receipts are for money received by the city treasurer from the county treasurer on account of sales of county real estate. One of these receipts was read in evidence and is as follows:

"Received from H. A. Hart, county treasurer, the sum of eight hundred fifty-one and 23-100ths ($851.23) for said city, for city's portion account of sales collected, in December, 1908; (Signed). January 11, 1909." (Transcript, pp. 100-101.)

The other receipts all showed the receipt of money

from the same source and were offered and read in evidence by giving the date and the amount of the receipt. (Transcript, p. 106.)

Defendants objected to the introduction of these receipts generally and on the specific ground that they do not show the receipt of money belonging to the Indebtedness Fund. (Bill of Exceptions, Record, pp. 105-6; Assignment of Errors No. 3, Record, p. 115.)

III. The court erred in admitting in evidence certain letters of the county treasurer written to the city treasurer in connection with remittances of money. These letters show the receipt of moneys from the same source, together with other moneys, as that shown by the duplicate receipts. One of the letters was read in evidence and is as follows:

"Office of the County Treasurer, Jefferson County, Port Townsend, Washington, January 11, 1909: Hon. C. L. Intermela, City Treasurer. Dear Sir: Herewith enclosed I beg to hand you my official check No. 2056, Merchants' Bank of Port Townsend, Washington, payable to your order for the sum of ($2784.63) Two Thousand, seven hundred eight-four dollars and sixty-three cents, being in full amount collected by me and due the City of Port Townsend, Washington, in the month of December, 1908, as follows:

From sales of county real estate, lands and premises	$ 851.23
From year 1904 tax rolls	.96
From year 1905 tax rolls	1.44
1906 tax rolls	8.44
1907 tax rolls	1922.86
Total	$2784.63

Please acknowledge this remittance as usual and oblige, Yours truly,

(Signed) HARRY A. HART,
Treasurer of Jefferson County, Washington."

(Bill of Exceptions, Record, pp. 102-3).

The other letters were of the same nature, and only that portion of them designating the amount received from the sales of county property together with the date of the letters was read in evidence. (Record, p. 103, Bill of Exceptions.)

These letters so far as the proceeds of the sale of county property is concerned, cover practically the same remittances as the receipts introduced.

The defendants objected to the introduction of these letters generally and on the specific ground that they do not show the receipt of any money belonging to the Indebtedness Fund. This ruling is assigned as error. (Assignment of Errors No. 4, Transcript, p. 116.)

IV. The court erred in denying defendants' motion for a non-suit. This motion was made on two specific grounds, as follows:

(a) On the ground that the plaintiff has not shown as alleged in his complaint, or at all, that it was the treasurer's duty to pay the warrant involved in the suit.

(b) On the ground that the plaintiff has not shown that on December 1, 1910, as alleged in his complaint, or at any time, the said treasurer had sufficient funds properly applicable to the payment of said war-

rant to pay the same. (Bill of Exceptions, Transcript, p. 107; Assignment of Errors Nos. 6 and 7, Transcript, p. 117.)

Both of these motions were repeated at the close of all the testimony and were again denied by the court, and an exception taken by defendants. (Bill of Exceptions, Transcript, p. 112.)

At the close of all the testimony on the motion for non-suit, the court had before it the additional fact as admitted by the parties on the trial of the cause that the council never made an order directing the treasurer to pay this warrant. (Bill of Exceptions, Record, p. 112.)

Defendants asked the court to make such finding in accordance with the admission of the parties, but the court refused to so find. (Defendants' Proposed Finding No. 13, Record, p. 58; Assignment of Errors No. 20, Record, p. 121.)

V. The court erred in denying defendants' motion at the close of plaintiff's testimony for a dismissal of the case as to the bonding company on the ground that no default of the treasurer has been shown upon which the bonding company could possibly be held liable. (Bill of Exceptions, p. 107; Assignments of Errors No. 8, p. 117.)

VI. The court erred in finding (first part of third finding, Record, p. 60) that the action brought by Alonzo Elliott against the City of Port Townsend on the

19th day of August, 1897, in the Superior Court of the State of Washington for the County of Jefferson, being cause No. 1784, of said court, was "an action for damages for breach of contract" without specifically stating that said suit was on a street grade warrant drawn on a special fund of a local improvement district in said city. (Assignment of Errors No. 12, Record, pp. 117-8.)

And in holding that the Superior Court in said case had jurisdiction to render the judgment it did render on the cause of action set forth in the complaint in said action. (Assignment of Errors No. 22, Record, p. 121.)

VII. The court erred in making that portion of the fourth finding (Transcript, p. 61) in which it is found that the regular meeting of the city council, held on February 15th, 1898, continued its sessions upon the two succeeding days; and in refusing to make the 6th, 7th and 8th findings proposed by the defendants, which read as follows:

"6. That at that time and at all times herein mentioned Ordinance No. 585 of said city was in force, which said ordinance provided that the regular meetings of the city council of said city shall be held on the first and third Tuesdays of each month.

"7. That on February 15, 1898, that being the third Tuesday in said month, the said city council held a regular meeting, and then took a recess till February 16, 1898, at three o'clock p. m., without stating for what purpose said recess was taken.

"8. That on the following day, February 16, 1898, the said city council met at three o'clock p. m.,

after the expiration of said recess, and after passing a resolution with reference to certain judgments that had been recently obtained against the city on street grade warrants, took a further recess till four o'clock p. m., of the following day; and at four o'clock p. m., of the following day, that is February 17, 1898, the said city council again met and ordered the issuing of the warrant sued on herein." (Findings 6, 7 and 8 proposed by defendants, Transcript, p. 54; Assignment of Errors Nos. 13, 15, 16 and 17, Transcript, p. 118.)

And in refusing to hold that the warrant in suit is void because issued at an adjourned meeting of the city council and not at a regular meeting of said council, as required by law.

VIII. The court erred in refusing to make the 10th, (second finding marked "10"), 11th and 12th findings proposed by defendants, as set forth in their proposed findings on pages 55, 56 and 57 of the record. The refusal to make these findings and each of them is assigned as error. (Record, pp. 119 and 120; Assignment of Errors, Nos. 17, 18 and 19.)

These three proposed findings are the same as paragraphs 2, 3 and 4 of the third affirmative defense. They show generally under what circumstances the warrant in suit was issued.

IX. The court erred in not holding that the said warrant was one of a series of warrants all of which were over-issued, that is, issued when the city was beyond its constitutional debt limit. (Assignment of Errors No. 24, Record, p. 122.)

X. The court erred in not holding that the war-

rant in suit was issued under such circumstances and at such a time as to make it a fraud against the City of Port Townsend and against the taxpayers of said city, as a matter of law. (Assignment of Errors Nos. 21 and 25, Record, pp. 121 and 122.)

XI. The court erred in not giving judgment in favor of the defendants (on the findings). (Assignment of Errors No. 26, Record, p. 122.)

ARGUMENT.

I. Jurisdictional Amount.

The District Court (formerly Circuit) has jurisdiction where "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars."

> Revised St. 629, Act of March 3rd, 1875, as amended in 1887 and 1888.

The object of this action is simply to recover the amount of a warrant the face value of which is $1548.12.

> *Edwards vs. Bates County*, 163 U. S. 269.
>
> *Auer vs. Lumbert*, 19 C. C. A. 72 and note p. 79.
>
> *Howard vs. Bates County*, 43 Fed. 276.

II. Motion for non-suit.

This motion was made at the close of plaintiff's testimony and again at the close of all the testimony.

The objection to the introduction of certain writ-

ten evidence consisting of the duplicate receipts of the city treasurer in the city clerk's office, and the letters from the county treasurer to the city treasurer accompanying the remittances of certain moneys may be considered in connection with this motion. The particular ground of the objection to the introduction of this evidence was that the receipts and letters do not show any moneys belonging to the Indebtedness Fund of the city and the motion for non-suit was made on the ground that they have not shown that there was any money in this fund to pay the warrant. And also that they have not shown that at any time it was the duty of the city treasurer to pay such warrant.

In order that plaintiff may recover he must prove a breach of the condition of the bond where such breach is denied as in this case and the burden of proof is upon him.

29th Cyc. 1468.

Aultman Taylor Machinery Company vs. Burchett, 83 Pac. 719 (Okl.).

Board of Supervisors vs. Lovejoy, 107 N. W. 276 (Mich.).

Plaintiff's warrant was drawn on the Indebtedness Fund and he attempts to show that defendant treasurer had sufficient funds in his possession on December 1st, 1910, belonging to this fund to pay the same.

The evidence introduced shows that between January, 1910, and December 1st, 1910, he received a cer-

tain amount of money as the city's share of the proceeds of the sale of county realty forfeited to the county for taxes amounting to more than the amount of this warrant. Was this evidence competent to show the receipt of money belonging to the Indebtedness Fund?

The Indebtedness Fund was created by an act of the legislature of 1897 to take effect February 1st, 1898. That portion of the law which shows what moneys shall go into this fund besides the levy especially made for such fund by the city, if any, is as follows:

"Sec. 7. All moneys collected on and after the first day of February, 1898, from taxes of the year 1896, and previous years, and from penalty and interest thereon, shall be paid into the indebtedness fund."

Laws of 1897, p. 223, R. & B. Code, Sec. 5135.

If plaintiff has a legal warrant the issuing of it on the Indebtedness Fund and the acceptance of the same by his assignor amount to an agreement that it shall be paid out of this fund and no other, and the treasurer under no circumstances could be held liable for refusing to pay it out of any other fund.

It might be questioned in the first place whether moneys coming from the sale of county property forfeited to the county for taxes is under the law of Washington a collection of a tax, but taking it for granted that it is for the purpose of this argument, plaintiff has not shown that the property forfeited to the county for taxes from the sale of which

this money was derived was so forfeited for the taxes for the year 1896 or for any previous years, and hence he has not shown the receipt of any money belonging to the Indebtedness Fund by the evidence introduced. It would have been an easy matter for the plaintiff to show from the records of the county where this money came from, whether from property that had been forfeited for delinquent taxes of 1896 or previous years or for delinquent taxes for subsequent years. If it was forfeited for delinquent taxes of years subsequent to the year 1896, it did not under the law just quoted belong to the Indebtedness Fund.

The warrant is not due until there is sufficient money in the fund on which it is drawn to pay it.

Savings Bank and Trust Company vs. Gelbach, 8 Wash. 499.

Potter vs. New Whatcom, 20 Wash. 589.

A plaintiff cannot under any circumstances recover until he has shown that his warrant was due and payable and that the treasurer refused to pay it when as a matter of law he was compelled to so pay.

"To entitle the creditor in such a case (holder of warrant drawn on special fund) to remedy by action or mandamus, it is necessary for the plaintiff to allege and prove affirmatively that there is money in the fund."

Dillon Mun. Cor., Sec. 854 (5th Ed.).

The plaintiff, however, tried to show that this money belonged to the Indebtedness Fund by introducing in evidence Section 9 of Ordinance No. 722, an

ordinance defining the duties of the city treasurer. This ordinance was passed December 4th, 1906, and the section introduced reads as follows:

Sec. 9. "It shall be the duty of the city treasurer to turn into the Indebtedness Fund all moneys received by the city from the County of Jefferson for its share of the proceeds of the sales of any county property, and all moneys from city taxes, penalties and interest, excepting moneys collected for the payment of any city bonds, and excepting the tax levies for the three preceding years which he shall segregate, immediately upon receipt, into the respective levies therefor, until all the legal outstanding claims against the "indebtedness fund" of the city shall have been paid, but the city treasurer shall pay no 'indebtedness fund' warrant, excepting the 'general expense,' 'fire and water,' 'light' and 'road' fund warrants without the special order of the city council."

Considering the last part of this section with the first, this section of the ordinance directs that all moneys coming from the sale of county real estate be placed in this fund, not absolutely, but only for a certain purpose; that is for the purpose of paying off certain warrants theretofore issued on certain funds therein designated. If the council had placed this money in this fund without instructions as to its use, it might be presumed that it belonged to this fund, but as they placed a restriction on its use, it is equivalent to placing it there for a certain purpose only.

Counsel for plaintiff who tried the action evidently went on the theory that the restriction as to the use of the money was wholly without authority of law and void and that he could disregard it.

If he would have shown that the money ordered to be placed in this fund by this section of the ordinance was money legally belonging to the Indebtedness Fund according to the law creating such fund, then as against the holder of a valid warrant on the fund, the restriction would not be legal, but in that event, the money would properly have been placed in the fund not because the council so ordered by ordinance but because the law so directed.

The plaintiff has not shown and has not even tried to show that the money the council directed to be placed in this fund was money coming from any of the sources from which this fund is replenished. The ordinance was passed in 1906. The council in this ordinance directed that the money coming from the sale of county property should be placed in this fund and placed a restriction on its use. After this lapse of time there is no presumption that any of this money came from property that was forfeited to the county for taxes for the year 1896 or previous years.

It must be borne in mind that this is an action against the treasurer and his surety for failure to pay the warrant and not against the city. It is a well established rule that a surety's liability depends upon the terms of his contract, that is, the bond that he executed.

29 Cyc. 1454.

A bond so far as it imposes a liability is construed strictly.

29 Cyc. 1454.

City of St. Louis vs. Sickles, Executrix, 52 Mo. 122.

The bond of defendant Intermela as treasurer is conditioned as follows: "Now, therefore, if the said Chas. L. Intermela shall faithfully perform all his duties as such treasurer of said City of Port Townsend according to law and city ordinances of said city * * *."

Plaintiff has not shown that the treasurer has violated any law or ordinance. In fact, this action was prosecuted because he obeyed the instructions contained in this ordinance, but plaintiff has not shown that the ordinance violates any law.

This argument is very much strengthened by the fact that while the warrants drawn on the particular funds mentioned in Section 9 of Ordinance No. 722 are made payable according to the terms of the law of 1897 out of the Indebtedness Fund thereby created, yet the Indebtedness Fund was not the only fund out of which the city could have been compelled to pay such warrants. They were drawn on those funds before the act of 1897 was passed, and any money that went into any of those funds by any law prior to the passage of the act of 1897 could have been subjected to the pay-

ment of such warrant. Hence the city being desirous of paying off these old warrants as soon as possible, placed in this fund for the purpose of paying such warrants, and no other, moneys which would not legally be subjected to the payment of plaintiff's warrant. In other words, plaintiff's warrant has an entirely different standing than the warrant drawn on funds mentioned in such Section 9; hence the fact that the city council ordered certain moneys to be placed in the Indebtedness Fund for the purpose of paying the latter warrant is no evidence whatever that that money could have been subjected to the payment of plaintiff's warrant.

State ex rel. Polson vs. Hardcastle, 68 Wash. ———.

This will more clearly appear by a reference to the different laws. The law under which warrants drawn on the funds mentioned in Section 9 of Ordinance 72 were issued, is found in Sub-division 9 of Section 636 of Hill's Annotated Codes and Statutes, and Section 647, which are as follows:

"§ 636. The city council of such city have power,

. . . .

"9. To levy and collect annually, a property tax, which shall be apportioned as follows: *For the general fund, not exceeding sixty cents on each one hundred dollars;* for street fund, not exceeding thirty cents on each one hundred dollars; and for sewer fund, not exceeding ten cents on each one hundred dollars. The levy for all purposes for any one year shall not exceed one dollar on each one hundred dollars of the assessed value of all real and personal property within such city."

"§ 647. Nothing in this chapter contained shall be construed to prevent any city having a bonded indebtedness, contracted under laws heretofore passed, from levying and collecting such taxes for the payment of such indebtedness, and the interest thereon, as are provided for in such laws, in addition to the taxes herein authorized to be levied and collected. *All moneys received from licenses, street poll-tax, and from fines, penalties, and forfeitures, shall be paid into the general fund.*"

Sections 1, 2, 3 and 7 of the Act of 1897, creating the indebtedness fund, are as follows:

"Section 1. In all municipal corporations, having less than twenty thousand inhabitants, there shall be maintained a fund to be designated as 'current expense fund,' and, after the first day of February, eighteen hundred and ninety-eight, a fund to be designated as 'indebtedness fund.'

"Sec. 2. All moneys collected by such corporations from licenses for the sale of intoxicating liquors and from all other licenses shall be credited and applied by the treasurer to said 'current expense fund': *Provided*, that this act shall not exempt such corporations from paying ten per cent of all money collected for liquor licenses, to the state.

"Sec. 3. Such municipal corporations shall levy and collect annually a property tax for the payment of current expenses, not exceeding ten mills on the dollar; *a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar*, and all moneys collected from the taxes levied for payment of current expenses shall be credited and applied by the treasurer to 'current expense fund'; and all moneys collected from the taxes levied for payment of indebtedness shall be credited and applied to a fund to be designated as 'indebtedness fund.'

"Sec. 7. All moneys collected on and after the 1st day of February, 1898, from taxes of the year

1896 and previous years, and from penalty and interest thereon, shall be paid into the 'indebtedness fund.'"

III. The legality of the warrant in suit.

The defendants have attacked the legality of the warrant on a number of different grounds which may be specified as follows:

First: Because issued in satisfaction of a judgment against the city which was void for want of jurisdiction.

Second: Because the warrant was issued not at a regular meeting of the city council as required by law but at an adjourned meeting in violation of a positive statute.

Third: Because the warrant was one of a large number of warrants that was voluntarily over-issued, that is, issued when the constitutional debt limit had already been exceeded.

Fourth: Because the warrant was issued under such circumstances as shown by the record from which the court should have concluded that the same was issued without authority of law and in fraud of the taxpayers of the city.

First, as to the jurisdiction of the court in the case of *Alonzo Elliott vs. the City of Port Townsend*, to render the judgment in satisfaction of which the warrant in suit was issued.

Van Fleet, in defining jurisdiction, says:

"Jurisdiction is simply power. This is the definition given by Chief Justice Green, of New Jersey, and is the best I have seen. The Supreme Court of the United States first defined it to be "the power to hear and determine." After this definition had stood for nearly fifty years and been copied by every supreme court in the Union, a cause was discovered where the court had the power to hear and determine, and yet its judgment was void for want of jurisdiction; so that learned court felt constrained to qualify the earlier definition so as to make it "the power to hear and determine and give the judgment rendered." Collateral Attack, Sec. 58 (2nd ed.)

Van Fleet in the same section, after making the statement above quoted significantly says:

"It is possible that cases may arise showing that still other terms must be added to the last definition in order to give a complete conception of jurisdiction."

In *Newman vs. Bullock*, 23rd Colorado 23, the court says: "It is safe to say that the tendency of later authorities, especially in the Federal courts, is to enlarge the definition of jurisdiction to make it include not only the power to hear and determine but also the power to render the particular judgment in the particular case."

The following cases sustain the idea of jurisdiction of the subject matter that the court must have power not only to hear and determine and render a judgment but must have power to render the particular judgment on the particular cause of action set forth in the complaint.

In re Permstick, 3 Wash. 672.

State ex rel. Summerfield vs. Taylor, 14 Wash. 495.

The following are cases that sustain the same idea of jurisdiction and are cases where judgments have been attacked collaterally and held void:

State ex rel. Dodge vs. Langhorne, 12 Wash. 588.

Hatch vs. Ferguson, 68 Fed. 43.

Johnson vs. McKinnon, 54 Fla. 221.

Russell vs. Shartleff, 28 Colo. 414.

Kelly vs. Milan, 127 U. S. 139.

Ritchie vs. Sayres, 100 Fed. 520.

Ewing vs. Mallison, 65 Kans. 484.

Paul vs. Willis, 69 Tex. 261.

Granham vs. Mayor of San Jose, 24 Cal. 585.

Kane vs. Rock Rapids Ind. School Dist., 82 Iowa 5.

Canal Bank vs. Partee, 99 U. S. 325.

Love vs. Blair, 48 L. R. A. 257 (Kans.)

United States vs. Walker, 27 L. ed. 927 (U. S.)

Ex parte Lange, 18 Wall. 163.

Bigelow vs. Forest, 9 Wall. 339.

Windsor vs. McVeigh, 93 U. S. 274.

Freeman Judgment, Sec. 116 (4th Ed.)

Charleston vs. Beller, 45 W. Va. 44.

On July 9th, 1897, in the case of *German American Savings Bank vs. Spokane,* 17 Wash. 315, the

Supreme Court of the State of Washington in a very lengthy opinion and after considering the decisions in many different states in the Union, decided that in the State of Washington no city can be held liable on what is known as a street grade warrant and ever since then the court has firmly held to this doctrine and never allowed a recovery against any city on such warrants.

Wilson vs. Aberdeen, 19 Wash. 89.

Rhode Island Mortgage, Etc., Co. vs. Spokane, 19 Wash. 617.

Doxy vs. Port Townsend, 21 Wash. 707.

Northwestern Lumber Co. vs. Aberdeen, 22 Wash. 404.

Potter vs. Whatcom, 25 Wash. 207.

State ex rel. Security Sav. Soc. vs. Moss, 44 Wash. 91.

Soule vs. Ocosta, 49 Wash. 518.

Jurey vs. Seattle, 50 Wash. 272.

State ex rel. American Freehold-Land Mortgage Co. vs. Tanner, 45 Wash. 348.

The judgment in the case of *Alonzo Elliott vs. The City of Port Townsend*, was entered on the 16th day of November, 1897, upon a complaint which shows clearly that the action was based upon a street grade warrant. (This complaint is set forth in full in defendant's answer, the record pages 12 to 35, and this copy of the complaint was agreed by counsel for the parties to this suit to be a true copy of the complaint

in said action, and that the said complaint might be omitted from the exhibit introduced in evidence and this stipulation by the parties was approved by the court, bill of exceptions, record page 106.)

It will thus be seen that at the time the judgment in satisfaction of which the warrant in suit was rendered it was a settled law of Washington that no city is liable on a street grade warrant and that said judgment was based upon said street grade warrant.

Before considering the second point which defendants claim made the warrant in suit illegal a few preliminary rules or doctrines in relation to municipal corporations should be noticed as follows:

A municipal corporation may make the same defense against any holder of a warrant that might have been interposed against the person to whom the warrant was originally issued. In other words, a warrant is not a negotiable instrument in the full sense of the term. There is no such thing as an innocent holder of such a warrant.

> *State ex rel. Olympia National Bank vs. Lewis*, 62 Wash. 266. (20 Wash. Dec. 45, March 8, 1911.)
>
> *Clark vs. Polk Company*, 19 Iowa 248.
>
> *Clark vs. The City of Des Moines*, 19 Iowa 199.

"A municipal corporation is not estopped after a warrant upon its treasurer has been issued to set up the defense of *ultra vires*, or fraud or want or failure of consideration."

Dillon Municipal Corporation, 857 5th Ed.

Thomas vs. Richmond, 12th Wall. 349.

A municipal corporation has only such powers as are expressly granted and such incidental ones as are necessary to make those powers available, and all of these powers are strictly construed. 2 Kent Com. 298.

Clark vs. City of Des Moines, 19 Iowa 199 (212).

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437; 117 Fed. 51.

When the statute provides that a power granted shall be exercised in a certain way the manner of exercising it is exclusive.

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437; 117 Fed. 51 (212).

One dealing with a municipal corporation is compelled at his peril to take notice of the powers of such corporation.

20 *Am. & Eng. Ency.* 1183.

The National courts will follow the decisions of the highest state tribunals in all matters of local law.

Willis vs. The Board of Com'rs., 30 C. C. A. 445 and note.

Claiborne vs. Brooks, 111 U. S. 410.

Livingston vs. Moore, 7 Pet, 469 (542).

In the same way the Federal courts will follow state decisions as to the weight of adjudications.

Wilson vs. Parren, 11 C. C. A., note p. 81.

And the Federal courts will also follow the latest adjudication of the State courts.

Wilson vs. Parren, 11 C. C. A., note p. 82.

Douglas vs. Pike Co., 101 U. S. 677. (See again.)

The warrant in suit was issued at an adjourned meeting of the city council.

Plaintiff's evidence shows that the city council met on February 15, 1898, that they adjourned at that meeting to February 16, 1898, without stating the purpose of their adjournment, and that on the 16th of February they met pursuant to adjournment and again adjourned until the 17th, and that then on the 17th they issued the warrant in suit. The defendants introduced Ordinance No. 585 of the City of Port Townsend, defendants Exhibit 2, which shows that the regular meetings of the city council were held on the first and third Tuesdays of each month. The 15th of the month of February, 1898, was the third Tuesday. It thus appears that the warrant was ordered at an adjournment of an adjourned meeting. The defendants asked the court to find in accordance with this evidence in their sixth, seventh and eighth proposed findings, but the court refused to make these findings and instead made a finding as follows:

"That a regular meeting of the city council of the city of Port Townsend convened on February 15, 1898, and continued its session on the two succeeding days; that at said meeting the city council agreed with Alonzo Elliott, the plaintiff in whose favor said judgment was rendered, that he should receive a warrant against the indebtedness fund of the city for the amount of his judgment, which warrant should bear interest at the rate of six per cent per annum instead of ten per cent, specified in the judgment of the court." (First part of fourth finding made by court, Record p 61.)

The law that was in force at that time regarding the meetings of the city council and that is in force now, is embodied in section 7681 of R. and B. Code and reads as follows:

7681 (934) Meetings of Council.

The city council, together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general municipal election, shall take the oath of office, and shall hold regular meetings at least once in each month, but not to exceed one regular meeting in each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor by written notice delivered to each member at least three hours before the time specified for the proposed meeting: Provided, however, that no ordinance shall be passed, or contract let, or entered into, or bill for the payment of money allowed, at such special meeting, or at any adjourned regular or special meeting. All meetings of the city council shall be held within the corporate limits of the city at such

place as may be designated by ordinance, and shall be public. (L. '90, p. 181, § 113; 1 H. C., § 632; L. '93, p. 158, § 3.)

If the court's finding on the question of the meetings that the council continued its sessions upon two succeeding days be interpreted that they adjourned from day to day, we have no fault to find with the finding, except that it does not state that they adjourned from the 15th, the regular meeting, without stating the purpose of their adjournment. If, however, the finding really means that they met on the 15th and remained in session for the 15th and the two successive days continually, without adjournment, the finding is absolutely contrary to the evidence introduced by the plaintiff himself. (See Plaintiff's exhibit "C," Record pp. 74 to 77, inclusive.)

The law just quoted expressly prohibits the city council from placing the city under any financial obligation at an adjourned meeting of the council. The issuing of this warrant is a direct violation of this law and the city council had no power whatever to in any way create or consummate legal financial obligations at such adjourned meeting.

20 *Am. & Eng. Ency.* 1162.

City of Fort Scott vs. W. G. Eads Brokerage Co., 54 C. C. A. 437.

The object of the law no doubt is to make the city council do their work so far as financial obligations against the city are concerned at regular meet-

ings and in public, that is, at times definitely fixed by ordinance, so that the taxpayers may know what their agents are doing.

If any evidence of the wisdom of this provision is needed, it is found in this very case. Records that they have introduced here, Plaintiff's Exhibits "A," "B" and "C," show that the council at this adjourned meeting of an adjourned meeting attempted to settle upon the city an indebtedness of over sixty-five thousand dollars, all on claims which the Supreme Court of the state had definitely and expressly decided are not a liability against the city. The lower court in its memorandum decision on the merits, record page 49, says:

"By the record, however, it appears that said resolution was adopted at an adjourned session of a regular meeting and not at a special or called meeting of the council."

It will be noticed that an adjourned meeting is within the express prohibition of the statute. The court then continued:

"Moreover, if the council had not passed the resolution its failure to act at a regular meeting could not affect the validity of the warrant, because the city officials could have been compelled by a writ of mandamus to issue a warrant to satisfy the judgment, therefore, the act of the mayor and the city clerk in issuing the warrant was not unauthorized and the warrant is not void."

It appears, however, from the record that the defendant city had taken an appeal from this judgment

by serving and filing with the clerk of the court a notice of appeal. There was some contention in the lower court that the appeal had not been taken in time, and had not been perfected by the filing of a bond or by the making of a deposit. These contentions are without merit. The notice of appeal, Defendants' Exhibit 1, record page 88, was duly served on the 14th day of February, 1898, and filed with the clerk of the court, all within ninety days after the entry or filing of the judgment on November 16, 1897. This perfected the appeal and it was not necessary for the city to give a bond. The last part of section 1721 of Rem. & Bal. Code, providing for bond for costs on appeal is as follows:

"But no bond or deposit shall be required when the appeal is taken by the state or by a county, city, town or school district thereof, or by a defendant in a criminal action."

In this way the appeal was not only perfected but such appeal operated as a supersedeas and absolutely stayed all proceedings until such appeal was determined.

Campbell vs. Hall, 28 Wash. 626.
Jordon vs. Seattle, 29 Wash. 581.

At the time the city council issued this warrant then the judgment creditor had no right whatever to proceed against the city either by mandamus or otherwise to compel the payment of this judgment or to compel the issuing of a warrant in satisfaction thereof. In other words, the action of the council in issuing this

warrant at an adjourned meeting of an adjourned meeting was purely voluntary on their part.

Campbell vs. Hall, 28 Wash. 626.
Jordon vs. Seattle, 29 Wash. 581.

The 8th, 9th and 10th specifications of errors may all be considered together. Defendants assigned as error the refusal of the court to make the 10th (2nd finding, marked 10), 11th and 12th findings proposed by defendants as set forth in their proposed findings on pages 55, 56 and 57 of the record. These three proposed findings are about the same as paragraphs 2, 3 and 4 of the defendants' third affirmative defense, as set forth in their answer on pages 33, 34 and 35 of the record. The reply of the plaintiff to this third affirmative defense denied in part only the allegations of these paragraphs, but all the allegations of these paragraphs denied by plaintiff in his reply were fully proved on the trial so that the court should have made the findings in accordance with the allegations of the affirmative defense. To specify: plaintiff in his reply denied that the city of Port Townsend duly appealed from the judgment rendered against it in the case of *Alonzo Elliott vs. The City of Port Townsend,* and points out two specific defects in the taking of the appeal. The first of these alleged defects was that the city did not give a proper bond, but we have heretofore shown that a municipal corporation in the state of Washington is exempt from giving a bond upon taking an appeal. The second defect mentioned was that the appeal was not taken

within the time required by law, that is not within ninety days after the entry of the judgment. This alleged defect is based on the fact that the judgment in the Elliott case was signed on the 14th day of November, and filed on the 16th day of November, 1897, the notice of appeal was not served until the 14th day of February, 1898, and the plaintiff considered that the appeal should have been taken within ninety days after the signing of the judgment, on November 14th.

According to the decisions of the Supreme Court of the state, however, the time within which an appeal may be taken runs from the date of the filing of the judgment with the clerk, which in this case was November 16th, 1897, and hence an appeal taken on the 14th of February, 1898, was within the ninety days.

National Christian Association vs. Simpson, 21 Wash. 16 (18).

Quarrel vs. Seattle, 26 Wash. 226.

According to these decisions then the appeal was properly taken and within the time required by law.

The plaintiff also denied that portion of defendants' third affirmative defense in regard to the agreement between the city of Port Townsend and Alonzo Elliott and denied that the said city entered into any such agreement therein alleged with Alonzo Elliott. The agreement alleged in said defense was that all the street grade warrant holders including the holder

of the warrant reduced to judgment in said cause of Alonzo Elliott against the city, agreed that the city would not defend actions brought on such street grade warrants nor appeal from the judgments that had been rendered on such warrants, nor in any wise resist payment of such judgments, but would satisfy all of such judgments so acquired and rendered including the judgment in said cause of Alonzo Elliott against the city by issuing warrants bearing six per cent interest on the indebtedness fund of said city.

The evidence introduced by plaintiff, Plaintiff's Exhibits "A," "B" and "C," clearly shows that such agreement was made by Alonzo Elliott, through his attorneys, and that acting upon such agreement the city actually did issue him a warrant on the indebtedness fund of said city in satisfaction of said judgment.

The issuing of the warrant to Alonzo Elliott was in itself an abandonment of the appeal.

Campbell vs. Hall, 28 Wash. 626.
Jordon vs. Seattle, 29 Wash. 581.

Considering that they proved all the allegations contained in this third affirmative defense that were denied by plaintiff, and the other allegations standing undenied, the defendants asked that the court make findings in accordance with the allegations of said affirmative defense, anl the court's refusal to make such findings is assigned as error.

The undenied allegations of the Third Affirmative Defense, together with the evidence adduced on

the trial, show that the warrant in suit was issued in fraud of the taxpayers of the city, and without authority of law.

State ex rel. American, Etc., Mort. Co. vs. Tanner, 45 Wash. 348.

Kane vs. Independent School District, 47 N. W. 1076.

Marksburg, Etc., vs. Taylor, 10 Bush (Ky.) 519 (523).

The case of *State ex rel. American, Etc., Mort. Co. vs. Tanner*, 45 Wash. 348, was a Port Townsend case, and involved warrants belonging to the same series as plaintiff's warrant; the only difference is that the warrants involved in that case were issued on the indebtedness fund of the city in satisfaction of judgments that had been obtained by default on street grade warrants. A default judgment, however, is as binding as any other. (*Howard vs. City of Huron*, 60 N. W. 803).

The findings do not support the judgment. According to the Fifth Finding made by the court the only money shown to have been received by defendant treasurer was money coming from the proceeds of the sale of county property, but this, as we already have pointed out, is not showing that he had money properly applicable to the payment of this warrant.

Again, this same Fifth Finding sets forth Section 9 of Ordinance No. 722, an ordinance defining the duties of the City Treasurer. This section does not show, nor does anything else in the findings show,

that at any time it was the duty of the treasurer to pay this warrant.

Defendants asked the court to make a finding embodying this section of the ordinance, with the added finding that the council never made an order directing the treasurer to pay this warrant. (Proposed Finding No. 13, Record page 58, Assignment of Errors No. 20, Record page 121). This, however, was expressly admitted by the parties on the trial of the cause. (Bill of Exceptions, Record page 112), and if the court considers it of importance, we desire to urge that such finding should have been made.

Respectfully submitted,

U. D. GNAGEY,
Attorney for Plaintiffs in Error.

L. B. STEADMAN,
Of Counsel for Plaintiffs in Error.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and AMERICAN SURETY COMPANY,

Plaintiffs in Error.

vs.

DAVID PERKINS,

Defendant in Error.

No. 2154.

Brief for Defendant in Error

Upon Writ of Error in Behalf of the Defendant Below to the United States District Court for the Northern Division of the Western District of Washington.

STATEMENT OF THE FACTS.

The District Court for the Western District of Washington, sitting in the Northern Division thereof, gave judgment at law against the defendants,

Intermela and American Surety Company, for $2,933.84 and costs. The defendants have brought the case by writ of error in due form to this court.

The pertinent facts are these:

Ever since November 28, 1883, the City of Port Townsend has been a municipal corporation of Washington—first, till August 16, 1896, under a special act of incorporation, and since then under a general act which classified cities by their population—this one being under 20,000 population and of the third class. On October 15, 1888, pursuant to the charter and city ordinances providing for street improvements and special assessments to pay their cost, the city let a contract for grading its "Washington Street," and agreed to pay for it by special warrants on the "Washington Street Improvement Fund." (Transcript of Record, pp. 12, 13, 21-27.)

The work was done and the warrants issued, among which was one of February 11, 1889, for $1,000 by which besides charging that sum to the fund the city also guaranteed its payment with ten per cent interest payable semi-annually. The warrant was presented for payment and indorsed, "Not payable for want of funds," on Feb. 14, 1889. (Transcript, p. 27.)

The city took no steps to enforce payment of the assessments on the land in the "improvement district" (Transcript, pp. 28-9); and on August 12,

1897, Alonzo Elliott, the then holder of said warrant, sued the city on the grounds of failure to collect the assessments and to meet its guaranty, on the faith of which the contract was performed. (Transcript, pp. 12-32.)

To this complaint the city put in a demurrer, after the overruling of which it stood on its demurrer, and judgment ensued, signed in open court, on November 14, 1897, but indorsed, "Filed this 16th day of Nov., 1897." (Transcript, pp. 38-40, 86-7.)

The city took an appeal to the Supreme Court of Washington on the ninetieth (the last) day from November 16, but two days too late counting from November 14—the date of the actual signing of the judgment. (Transcript, p. 88.) Immediately afterwards, however, the city entered on negotiations with Mr. Elliott and other judgment creditors on similar warrants, in consequence of which the city waived its appeals, issued general warrants, and received satisfactions of the judgments. (Transcript, pp. 70-77.) The warrant in suit is at page 4.

This settlement was brought about by proceedings of the city council held on February 15, 16 and 17, 1898 (Transcript, pp. 72-77, and 95-100); but the city contests their legality on the ground that the council could exercise its power to allow bills only at its regular meetings which by its Ordinance

No. 585 were to be held only on the first and third Tuesdays of each month; whereas the third Tuesday of February, 1898, was the 15th day of that month, and the proceedings of the city council were carried over by "recess" adjournments to the 16th and 17th days, and the actual agreement to settle was not closed till the 17th. The settlement involved a reduction of interest from ten per cent to six per cent. (Transcript, pp. 54, 55, 90, 95-100.)

By virtue of that compromise, the judgment for Elliott was satisfied and a warrant to him on the "Indebtedness Fund" was drawn on February 18, 1898, for $1,548.12 with six per cent annual interest and the next day was presented to the city treasurer and by him stamped "Not paid for want of funds." (Transcript, pp. 4, 5.)

This action was brought on December 19, 1910, by David Perkins, a citizen of Massachusetts, and assignee of Alonzo Elliott, the warrant-payee, who was a citizen of New Hampshire, against the city treasurer and the surety on his official bond, to recover damages against both on the ground of a breach of his bond by refusal to pay the warrant and interest on demand on December 1, 1910, when he had money in the indebtedness fund sufficient to pay it. (Transcript, pp. 2-7.)

The city by its answer set up defenses which were in brief that (1) the judgment in *Elliott vs.*

Port Townsend was void because it was then the law that a city could not be made liable on a street grade warrant, and the warrant in suit herein was ordered at a special, not a regular, meeting of the council; (2) the action was barred by the statutory limitation, because the city council in 1899 had declared it would not pay any such warrants; and (3) when the warrant in suit was issued there were judgments for about $100,000 of street grade warrants, and like warrants not in judgments for about $30,000 more; the judgments were taken by default under an agreement with the city council that the cases should go to judgment, although the Supreme Court had held that a city could not be held liable on such warrants; and the warrant in suit and others were issued voluntarily; that the city was beyond its debt limit at the time of their issue, the voters had never validated the debt, and the city council afterwards repudiated the agreement. (Transcript, pp. 11-36.)

All the essential allegations of the answer were put in issue by the reply. (Transcript, pp. 37-43.)

The reply, however, did not deny that the city was beyond its debt limit *in 1898 when the warrant in suit was issued,* because we deem that fact immaterial. *There was no allegation and no evidence that the city was over the limit in 1889 when the original grade warrant to Williams, the contractor,*

was issued, which was the basis of the Elliott judgment, nor even in 1897, when that action and judgment occurred.

At the trial before Hon. C. H. Hanford the foregoing facts were proved and also that the defendant Intermela had received by sundry remittances from the county treasurer sums for the indebtedness fund sufficient to pay the warrant in suit, which was No. 2, with interest, after payment of all prior charges on that fund.

The essential parts of the second and third defenses were in fact abandoned at the trial, as no evidence of any repudiation of the agreement with judgment creditors, or of any notice of such action of the city council was given; nor was there any evidence of any such agreement by the council that the warrant holders might take default judgments, as was pleaded; nor even that any default judgments were entered. (See Bill of Exceptions, Transcript, pp. 93-113.)

The findings (Transcript, pp. 59-61, 65-66) contain all the ultimate and essential facts to sustain a recovery and negative all the defenses.

POINTS AND ARGUMENT.

I.

THE CAUSE INVOLVED THE REQUISITE JURISDICTIONAL AMOUNT.

The action was upon the official bond of the City Treasurer; and the breach assigned was the non-payment of a warrant under a state of alleged facts showing his then instant legal duty to pay it out of his official funds. If such was his legal duty, there was an instant breach of his duty and therefore a breach of his bond. The remedy given by law for that breach is a judgment for damages against him and his surety. The test of the jurisdiction, then, is: What are the damages? They may be *measured* by a prior obligation of the treasurer's principal whose funds he handles and the accrued interest on that obligation, but they are not *identical* with that obligation. If the action were against the city directly, on the original judgment or on the warrant issued to pay for the judgment, then the interest would be a mere incident of the original obligation and could not be reckoned as a part of the jurisdictional amount, *because the city was at all times from the entry of the judgment or issue of the warrant legally bound to pay it,* and the non-payment was a continuing default or breach of its legal duty. Not so with the treasurer. For

he was under no legal obligation to pay the warrant in suit until either (1) the city council ordered him to pay it, or (2) the holder presented it and demanded payment when there was money in his hands wherewith to pay it. At that instant and not sooner did his legal duty to pay come into existence and suffer immediate breach by his refusal to pay. Therefore, the damages arose at that instant and not sooner, and were measured by the amount *then due* from the city, and not by some amount previously due which grew *de die in diem* by the accrual of interest.

The distinction is clearly shown in one of the cases which the defendants' counsel cite:

Edwards vs. Bates County, 163 U. S. 269, in which the court held, directly against the defendants' contention, that defaulted coupons to a bond sued on with the coupons are of themselves primary obligations (although their origin was as interest) and could be reckoned as a part of the jurisdictional amount. And the same confusion of thought, between a principal and an accessory, is commented on in

Brown vs. Webster, 156 U. S. 328.

The same fallacy underlies the decisions in

Auer vs. Lombard, 72 Fed. 209; 19 C. C. A. 72, and

Howard vs. Bates County, 43 Fed. 276,

which must be considered to be overruled by the later cases cited in the Supreme Court.

On the same principle, it was held in

Zeckendorf vs. Johnson, 123 U. S. 817,

that on an appeal to the United States Supreme Court from a judgment of a territorial Supreme Court affirming the judgment of the territorial District (trial) Court, the test of the $5000 jurisdictional limit of the Federal Supreme Court was the amount due at the time of the territorial *Supreme* Court, not *District* Court, judgment—thus including interest on the District Court judgment till it was affirmed by the territorial Supreme Court.

The learned district judge before whom the action was tried put the point very clearly and tersely in his "memorandum decision on the merits," printed at pages 46-50 of the Transcript of Record.

II.

THE JUDGMENT, AND EQUALLY THE WARRANT ISSUED TO REPRESENT IN NEGOTIABLE FORM THE JUDGMENT DEBT, WERE INCONTESTABLE ON THE MERITS.

This point involves the two sub-heads that: (1) The judgment was incontestable; (2) The warrant which was merely a convenient mode of providing ultimate cash to pay the judgment was equally incontestable.

1. The proposition that the judgment in *Alonzo Elliott vs. City of Port Townsend* was incontestable, depends upon the jurisdiction of the Superior Court of Washington in and for the County of Jefferson in that action.

Now the plain facts on that question are that the action was brought in that court (being the constitutional court of record of general civil jurisdiction), by service of due process, on a street grade improvement warrant dated February 11, 1889, based on the provisions of the state statute and the city charter respecting municipal powers to make improvements and the mode of defraying their cost by special assessments, and on city ordinances for carrying those provisions into effect and for making this particular improvement; that it was also alleged in the complaint in that action that the city had neglected its legal duty to enforce the special assessments and thereby lost the means of liquidating the warrants, and also to induce the contractor to undertake and fulfill his grading contract, had guaranteed to him the payment of the warrants issued under his contract, one of which warrants was the warrant in suit; that the city was then within its constitutional limit of indebtedness (1½%) and hence was competent to contract such liability as a general municipal debt; and that by reason of said facts it became so liable on that war-

rant. See complaint in *Elliott vs. Port Townsend,* set out as part of the answer herein. Transcript pp. 12-31.

To that complaint the defendant city demurred by its official adviser—the acting city attorney—and on the overruling of the demurrer it "stood upon its demurrer" and judgment for the plaintiff Elliott was entered on November 13, 1897, for $1523.42 with ten per cent interest from said date.

Transcript, pp. 38-40, 82-7, 108-9.

On February 14, 1898, the city appealed to the Supreme Court of Washington by the usual notice. By proceedings of the city council on February 15, 16, 17, 1898 (Transcript, pp. 70-77) which in effect were a compromise with Mr. Elliott and sundry other judgment creditors whose judgments were of the same origin, the city offered and the creditors accepted a reduction of interest from ten per cent to six per cent, and the city waived or abandoned its appeals and issued to the judgment creditors warrants for their respective judgments with six per cent interest from their dates to that time. The warrant in suit was consequently issued for $1548.12 (being $1523.42 and 6% interest for three months and four days) on February 18, 1898, and

was presented to the City Treasurer for payment and by him stamped "Not paid for want of funds," on February 19, 1898, and thereby under the statute legal interest began to accrue.

Transcript, pp. 5, 6, 70-77, 95-100.

The defendant attacks the jurisdiction of the court to render the judgment in the case of *Elliott vs. Port Townsend,* upon the ground that the court had no power under decisions of the Supreme Court of Washington to render a judgment against a city on a special street improvement warrant. We do not dispute the general doctrine that jurisdiction is not only the power to hear and determine, but also includes the power to render the judgment appropriate to the issues and the evidence. For instance, a decree adjudging a trust cannot be rendered in a criminal case for embezzlement; nor can a judgment of fine and imprisonment be entered on a debt, however atrocious the moral aspect of the debt. But the distinction between *lack of jurisdiction* to render a particular judgment and *mere error* in that judgment is easily obliterated by a slight confusion of thought; and we believe that confusion is exhibited in the defendants' brief. Nor do we deny that where there is lack of jurisdiction or power to render the judgment in question, it may be attacked

collaterally, as it is here. But it is easy to see that all the authorities cited to sustain the defendants' view on page 25 of their brief are inapplicable to this case.

State ex rel. Dodge vs. Langhorne, 12 Wash. 588, involved a petition by a witness in another action for an order in an insolvency proceeding to which he was not a party that a judgment creditor who had collected part of his judgment against the insolvent must pay the witness his fees. The court properly held it had no power in such a proceeding to make such an order.

Kelly vs. Milan, 127 U. S. 139,

held that a consent decree in chancery, on a bill filed by a town attacking its railroad aid bonds, that the bonds were valid, was not a binding adjudication. Quite correct. But it involved the *town's* power to consent, not the *court's* power to decree. And it does not touch the Elliott judgment, which was rendered after a contest of the city's liability, by demurrer. A judgment on demurrer is as much *res adjudicata* as one rendered on trial of the facts.

State ex rel. Abernethy vs. Moss, 13 Wash. 42;

Gould vs. Evansville R. Co., 91 U. S. 526.

Canal Bank vs. Partee, 99 U. S. 325,

held that a married woman in Mississippi was not

subject to a personal judgment for debt, without showing that she had a separate estate, and such a judgment was void.

Windsor vs. McVeigh, 93 U. S. 274,
involved a decree of confiscation of property seized in a suit *in rem:* and it was held void because the court had stricken out the owner's appearance and refused him a hearing. The opinion, by Justice Field, says that the judgment must not transcend in its extent or character the applicable law; and that when jurisdiction has once attached *"everything done within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud."* That is exactly where we stand.

Bigelow vs. Forrest, 9 Wall. 339,
held that the power of the court to decree confiscation for participating in the Southern Rebellion was confined to the title for the life of the rebelling owner, and hence a decree forfeiting the fee was void as to the estate after his death.

United States vs. Walker, 109 U. S. 258,
held that a probate court had no power to compel an administrator to account for cash realized from the assets to an administrator *de bonis non*, because his duty is to account directly to the heirs, etc.

These last two cases are instances of the fa-

miliar rule that courts of limited jurisdiction are held strictly to their limits.

Love vs. Blauw, 48 L. R. A. 257 (Kans.), held that there is no power in a court of equity to decree partition at the suit of the life tenant against the remaindermen in fee.

Hatch vs. Ferguson, 68 Fed. 43, and
Ritchie vs. Sayres, 100 Fed. 520,
applied the same familiar rule of limited jurisdiction to cases of a guardian's bond and an attachment of land of a non-resident as the essential bases of adversary proceedings whereby lands were sold. Of course such matters are *stricti juris,* and if the initial steps to gain jurisdiction are not taken, it never is gained and the whole superstructure is a nullity.

McKinnon vs. Johnson, 54 Fla. 221; 48 Sn. 910,
is an ejectment in which various points of pleading, evidence, error, etc., are ruled; but we fail to see the applicability of any of them to the case at bar, except that the points decided fit in well enough, along with the law of this case, to the system of law to which they belong.

Russell vs. Shurtleff, 28 Colo. 414; 65 Pac. 27, simply holds that under a code which limits the judgment to the relief prayed for, a joint judgment

against all the defendants cannot be taken under a prayer for a several judgment against each in the proportion of his respective interest. This is good "crowner's quest law", but it bears very little on the case in hand.

Paul vs. Willis, 69 Texas 261; 7 S. W. 357; and

Ewring vs. Mallison, 65 Kans, 484; 70 Pac. 369,

both decide the familiar point that jurisdiction in probate is limited to the county of decedent's residence, or death, or property, and for lack of any such fact may be collaterally attacked.

Branham vs. Mayor, etc., of San Jose, 24 Cal. 585,

rules that as a municipal corporation lacks the power to mortgage its property, no title whatever can be based on a foreclosure of such a mortgage even after sale, confirmation and entry. No one can doubt that!

Kane vs. Rock Rapids Ind. School-District, 82 Iowa 5; 47 N. W. 1076,

held that a judgment by default against the district entered by connivance of its board on a debt incurred when the district was indebted in about half of its assets, and was thus vastly beyond its constitutional limit, was open to attack by taxpayers for fraud. This decision has no applicability to the point it is cited to—which is lack of jurisdiction; and

as for fraud the defense at bar (apart from everything else) *lacks the vital element that the city was beyond its debt limit when the debt was incurred*—that is, on February 11, 1889. (Transcript. p. 27.)

Charleston vs. Beller, 45 W. Va. 44; 30 S. E. 152,

merely holds that in a prosecution under a city ordinance there is no power to adjudge costs against the city; hence, prohibition will issue.

Now in all this long list of cases cited in the defendants' brief there is not one which really meets the point at issue, or which does anything but lay down in general terms the doctrines about jurisdiction and collateral attack which no lawyer and no judge would dispute.

To bring these general doctrines to bear effectively on the case at bar we must come to close grips with the question: Had or had not the Superior Court of Washington in Jefferson County jurisdiction to render a judgment against the City of Port Townsend for damages for breach of its contractual and legal duties.

Here we come to the precise line between *"lack of jurisdiction"* and *"mere error"* in a judgment. Assuming jurisdiction of the *person* which is not here in question, lack of jurisdiction always consists in legal incapacity of the court either to act at all on the subject-matter, or to act under any cir-

cumstances in the way it does act; hence in either case its action is void. But if the court has the power to pass upon a controversy of a given class or nature, and to render a certain kind of judgment upon it, then its action thereon, however contrary to the rules of law or to the facts, is conclusive. A trial judge or an appellate court may decide a case absolutely contrary to the law or the facts, or both; there is no help for it except by appeal or other "direct attack" to correct the judgment. That is *"mere error."* But if in a case for a personal injury against a mill company the court enters a judgment enjoining the company from operation, or appointing a receiver, until it pays the damages allowed, that judgment is *void,* because no court under our system of law has that power in any circumstances. On the other hand, if I am sued for a debt I never contracted, on false allegations, and I default the case and take no proper steps to assert my defense, either before or after judgment, I am bound by the judgment. Even if I contest in vain a fictitious claim, I never can be heard to say later that the judgment was *void.* So, many other instances on both sides of the line can be imagined. All this is "horn-book law" and is stated only to bring out in sharp relief the distinction between

powerlessness to adjudge, and *incorrectness in adjudging,* at all, or in a given way.

Now in the case of *Elliott vs. Port Townsend,* we may concede at this point (merely for the sake of argument) that the Superior Court ought to have, or would have, dismissed the action after a trial "on the merits"; that is, a hearing of evidence of the facts, *pro* and *con* the city's liability. We may even concede that it should have sustained the demurrer to the complaint on the ground that it did not state "facts sufficient to constitute a cause of action," i. e., it did not show the city was liable. Nevertheless, its actual decision was a "mere error." Any court has the power to say in any case within the class of cases with which it deals, whether a "cause of action" or a "defense" has been made out, by either allegation or evidence. That is of the very essence of judicial action. If a court cannot so hold, either way, right or wrong, it is a ridiculous absurdity.

This idea of "lack of jurisdiction" cannot be extended so broadly that it shall cover all cases or classes of cases where the courts hold a liability does not exist. For instance, it is the law in Washington (or was before the state went into the casualty insurance business) that contributory negligence of

an injured employe was a good defense to his employer. Granted the facts, the suit must fail. But no one would say that a contrary decision, in spite of these facts, was void.

The City of Port Townsend was a municipal corporation of the third class; that is, under 20,000 population. As such, it could sue and be sued, it could incur debts within its constitutional limit, it could make improvements, either at the expense of the citizens generally, or at that of those who were specially benefited; it could carry on the general activities of a modern city in matters of police, sanitation, lighting, etc.

In all these ways and many others, it could incur debts (up to the limit), and even by wrongful or negligent acts of its officers within their spheres of power and duty could incur liability for damages. The Elliott case was one involving the question: Has the city made itself liable for this special grade warrant, by guaranteeing its payment, or by neglecting to collect it from the lots or owners benefited, or by both? The case was one of a class of cases which the court had the power to pass on when brought before it; the court did pass on it rightly or wrongly; the defendant exercised its right to stand on the legal point of no liability, and

not contest the facts, presumably because its agents to which its interests were entrusted, concluded in the exercise of their honest judgments that such was its best course. The city took its appeal, but then immediately negotiated a compromise by which on this judgment and others for a large aggregate it saved four per cent interest per year for some fifteen years. Now we admit that if the Elliott judgment was void, the warrant issued to pay it, here in suit, was void. But it has never been decided by the Supreme Court of Washington or by any other respectable court that a judgment such as this is void for lack of jurisdiction or is vulnerable except as an erroneous judgment. The judgment in form and substance is just such as should have been granted in an action against a city on a liability where by law or by contract interest at ten per cent ran on the liability. We therefore meet the test in the above quotation from Justice Field as to "the extent and character of the judgment rendered." Granted the liability, no other judgment was possible. But whether there *was* liability, was the precise point before the court; *and an erroneous decision does not impeach or avoid jurisdiction.* Jurisdictional power or its lack is equally available for each party, and equally vital or fatal to a decision for either side. Estoppels are mutual. If the decision of the Superior Court had been the other way, could Elliott, or the plaintiff

here, have said the judgment was void and hence we could re-litigate the question? The conclusive answer would have been that the court had passed finally on a case where it had the power to decide whether the city was liable, and having said it was not, we could not re-try the question. This shows that the real objection of the city to the judgment is not that the court could not try cases against cities on alleged liabilities for street grade warrants, but that the court under the then latest ruling of the Supreme Court should render a decision in only one way. But that is a matter *of error, not of jurisdiction.* It has never been held that jurisdiction is made and unmade by the latest rulings of the Supreme Court. If it were the jurisdiction of trial courts in some states would be in a state of perpetual flux, instead of being the most stable thing in the judicial system. Judges come and go, grounds of action or defense change with legislation or court decision; *but jurisdiction abides.*

Two citations in the defendants' brief are wholly inapplicable to this point.

In re Permstick, 3 Wash. 672,

holds that a judgment in a criminal case that the complaint was malicious and causeless and the complaining witness shall stand committed for payment of the costs is void. That is a case of a judgment of other "extent and character" than was appropriate to that class of cases.

A county not being liable to garnishment in any case under the statutes as construed by the Supreme Court, it properly held that a judgment of garnishment against a county was void.

State ex rel. Summerfield vs. Tyler, 14 Wash. 495.

But in that very case the distinction between error and non-jurisdiction is clearly drawn by the then Ch. J. Hoyt:

"It is familiar law that a judgment rendered in an action in which a court has jurisdiction of the person upon a complaint which does not state a cause of action is not void but simply erroneous. * * * *If the county could not be sued at all,* a judgment against it would be absolutely void. * * * If on the other hand it was subject to garnishment, the claim that the judgment was void by reason of the fact that the particular debt which was sought to be reached was not subject to garnishment cannot be sustained. Such a fact might be sufficient to show that the court *committed error in the rendition of the judgment,* but would not be sufficient to show that it acted without jurisdiction in so doing." 14 Wash. 497.

The court thereupon construed the statute to not include counties among those subject to garnishment and therefore *there was no such action possible under any circumstances.*

By parity of reasoning the city would not be liable in any event on any case for damages from breach of its contract or neglect of its duty, if the

law did not permit any action to be brought against the city *in any event on any such state of facts.*

That would mean that the court *had no power* over the city. But if the court can entertain actions against cities to enforce their liabilities arising from their transactions, then it has jurisdiction of any given case of that character, and its judgment for either party, whether right or wrong, is binding on both.

The general doctrine that a judgment is a bar to any defense which was raised or might have been raised in the action is settled in this court by the cases (among others) of

Cromwell vs. County of Sac., 94 U. S. 351;
and
United States vs. New Orleans, 98 U. S. 381;

and in the State of Washington by the case (among others) of

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5.

An analysis of the cases in Washington on special warrants for improvements in suits against cities shows that there was no lack of jurisdiction in this case.

On February 11, 1897, the Supreme Court of Washington, in

Bank of B. C. vs. Port Townsend, 16 Wash. 450,

held that a city which had issued a special warrant and contracted to provide for the payment of it is subject to a judgment on its contract, payable out of the general fund. This case was considered to have settled the law in Washington on that point until

German-American Sav. Bk. vs. Spokane, 17 Wash, 315,

unsettled everything, opened a door to repudiation for bankrupt cities, and caused much litigation.

Only three days earlier, this court in

Denny vs. City of Spokane, 79 Fed. 719,

had held that the defendant was liable on a street grade warrant where it had agreed to levy and collect the assessment without delay, but owing to its mistake as to the law its ordinance was void and some of the reassessments failed through outlawry.

Both of these cases were based on contracts made and warrants issued for street improvements in 1889 and 1890. The court will please to note that the original warrant in this controversy was issued in 1889.

Between 1889 and 1897, several decisions on such special warrants were made in Washington, most of which are cited in *Denny vs. Spokane.*

Baker vs. City of Seattle, 2 Wash. 576, (1891)

held that such warrants were not to be reckoned

within the general indebtedness, under the constitutional limit.

Soule vs. City of Seattle, 6 Wash. 315, (1893) held that the warrant holder, under the peculiar provisions of the city charter, could not recover against the city, but left it "an entirely open question whether municipalities may not, under different circumstances, make themselves liable *by omissions of the character presented here*"—which were neglect for some years to reassess.

Spokane vs. Browne, 8 Wash. 317, (1894) recognized the right of the city to reimbursement by the lot-owner for the obligations it had incurred in his behalf.

Then came the case of

Stephens vs. Spokane, 11 Wash. 41, (1895) where it was held that a city is not limited to special assessments, and is liable when it has taken no steps for five years to collect the assessment. In the case at bar the neglect was for nine years—from Feb. 11, 1889, to Feb. 19, 1898.

Thomas vs. Olympia, 12 Wash. 465, (1895) distinguished *Stephens vs. Spokane,* and held that where the city has in good faith and with care made the assessment, and failed to collect it because

of adverse court rulings and has taken steps to make a new assessment, it cannot be held liable; and also if the contractor by the terms of his contract waives the right to pay in any way except by special warrants, he cannot recover from the city on the score of its negligence.

Frederick vs. Seattle, 13 Wash. 428, and
Cline vs. Seattle, Ibid. 444 (1896)

sustained reassessments after invalid primary assessments. They are cited here only to show that municipal officers were endeavoring in the light of the previous rulings to relieve the city from liability for neglect to collect the assessments. They go to show that it was the general understanding at the time not that a city could under no circumstances become liable on a street contract, but that it might or might not be liable according to the circumstances. That notion is destructive of the theory of no jurisdiction.

On a second appeal the *Stephens* case appears again as

Stephens vs. Spokane, 14 Wash. 298, (1896)

where the court held that even on a showing of negligence the city is not liable, "*unless it has failed to take any steps for the creation of the special*

fund upon which the warrants were drawn, or has been guilty of such negligence in what it has attempted to do that the right to cause such fund to be created has been lost" (p. 301). In other words the city is not exempt absolutely, nor liable absolutely, but is liable *sub modo.* Now those are the precise allegations made in *Elliott vs. Port Townsend* (Transcript, p. 29) and the pleader must have drawn his complaint with 14 Washington Reports open before him at page 301.

Next came the cases of

Bank of B. C. vs. Port Townsend, 16 Wash. 451 (Feb. 1897),

already summarized, and

McEwan vs. Spokane, Ibid. 212 (Dec. 1896), cited by this court in *Denny vs. Spokane,* and which held that under a contract to provide a fund to pay the warrants, and to proceed without delay to that end, and under allegations of neglect to provide any fund, the city was liable, and its mistaken view of the law will not save it.

Then came the case of

German-American Sav. Bk. vs. Spokane, 17 Wash. 315 (July, 1897),

on which the defendants rely, and which overruled *McEwan vs. Spokane,* and qualified other earlier decisions of the same court.

But it is to be especially noted that in none of the Washington cases hitherto was there a syllable intimating that there was no jurisdiction in the trial court, but only that in a given state of facts no cause of action was shown. That was the jurisdictional subject matter before the court.

At this point the court should also note and bear in mind that while the *German-American Bank* case held that when a city has reached its constitutional debt limit it cannot make itself generally liable by contract respecting special improvements, and the facts there involved that point, no such state of facts existed here at the inception of this liability—as we shall show later.

Proceeding onward from the date of the *German-American Bank* case, we find the course of decision in Washington was this:

Wilson vs. Aberdeen, 19 Wash. 89, and
R. I. Mtge. etc. Co. vs. Spokane, Ibid. 67,

both decided in 1898, followed said case and held that the city was not liable, even where the remedy against the lots was lost by its neglect.

So did

Doxy vs. Port Townsend, 21 Wash. 707 (1899).

Next came

Northwestern Lumber Co. vs. Aberdeen, 22 Wash. 404 (1900),

which followed as to two warrants in suit the *German-American Bank* case, but where the city had collected the money and exhausted the fund by paying warrants out of their order of issue, held that the city was liable on a special warrant of date prior to those paid. It certainly could not be argued that the court had no jurisdiction of one part of this case, although it had of the other part.

Potter vs. Whatcom, 25 Wash. 207 (1901) was a case of the assessment (being based on the benefits received by the adjacent property and not on the cost of the improvement) falling much short of the cost; and the court held that the city was not liable. But the court had held on a previous appeal in the same case that the city was liable where it collected the money and its treasurer embezzled it;

Potter vs. New Whatcom, 20 Wash. 589 (1899); and also was liable for the accumulated interest where it had failed to include any more than the face of the warrants in a re-assessment.

Phila. & Trust Co. vs. New Whatcom, 19 Wash. 225 (1898).

It is hard to see the distinction in respect of liability for not raising enough money to pay inter-

est and not raising enough to pay prime cost. But the point to be noted here is that no possible line of *jurisdiction* can be drawn between cases where the city by its action or inaction incurs, and others where it escapes, liability.

State ex rel. Security Sav. Society vs. Moss, 44 Wash, 91, (1906).

was a mandamus to compel a city treasurer to pay general fund warrants. The city was incorporated under a statute afterwards held unconstitutional. Later it procured a valid reincorporation; meantime, under the *de facto* but void incorporation it had let a street improvement contract; the work was done, and warrants issued; the city later attempted to validate the debt and issue its "general fund" warrants to take up the special warrants. The court held that the case was ruled by the *German-American Sav. Bank* case and there was no consideration for the general warrants.

State ex rel. Am. Freehold-Land Mortgage Co. vs. Tanner, 45 Wash. 348, (1907),

decided on the face of the pleadings and admitted facts, on certain warrants issued to pay judgments against Port Townsend on street grade warrants, that such warrants were open to attack on the ground of collusion of the city officers in letting the judgments go by default and were therefor voidable for fraud. Those judgments were taken some time after that of *Elliott vs. Port Townsend;* there is no

allegation, admission or evidence here of fraud; and the case above cited is totally unlike that at bar in its essential features. It is further to be noted that the Supreme Court of Washington entirely ignored in that case its own decisions regarding collateral and direct attacks on judgments; and in view of the well-settled law in the Federal Courts on that subject the decision cannot be of authority here.

Soule vs. Ocosta, 49 Wash. 578, (1908),

simply applied the rule of non-liability to warrants where the property was not benefited nor anything ever paid into the special fund.

Jurey vs. Seattle, 50 Wash. 272, (1908),

held that the city's liability for diversion of the special fund sounded in tort, and was barred by charter provisions as to filing claims for damages.

We have thus by a careful analysis of all the decisions cited in the defendants' brief on a city's liability on special warrants, and of some others, shown that in every case the question was treated as purely a matter of *liability*—a question of the existence or proof of "a cause of action." In not a single case is there a single phrase hinting at the lack of jurisdiction of the courts to entertain and pass on such cases. And in none was there a question of the binding effect of judgments—the doctrines of *res judicata* and "direct attack," except in *State ex rel. Mortgage Co. v. Tanner,* 45 Wash. 348, where

by a most violent straining of precedents and settled law the court was able to reach a judgment which it doubtless deemed just "on the equities" by ignoring the law.

We conclude, then, that there was no lack of jurisdiction and that the judgment in *Elliott vs. Port Townsend* was a valid and binding judgment, not open to question as to the city's liability in any way except by appeal or other "direct attack" in due form.

But there is another aspect of the case which strengthens (if needed) our position.

The original street grade warrant was issued on February 11, 1889, to W. C. Williams, the contractor. Some time betweeen that date and June 1, 1897, it passed in the course of business and for value to Alonzo Elliott. It also received the approval and ratification (if any were needed) involved in the payment of interest down to August 11, 1892, a period of three and one-half years from its issue.

Now, under these circumstances the doctrine of

Gelpcke vs. Dubuque, 1 Wall. 175.

applies directly. And the case of

Douglass vs. Pike County, 101 U. S. 677,

which the defendants' counsel cite as holding that the Federal Courts follow state law itself lays down

the very doctrine of *Gelpcke vs. Dubuque* and is a pointed application of it. In the period of over thirty years which has elapsed since those two cases were decided, they have been cited, followed and applied in innumerable instances by the Federal Courts, and to a great variety of facts, and their doctrine is now firmly imbedded in federal jurisprudence for the protection of innocent investors. What, then, is that doctrine?

It is that when the state courts have decided the law one way, and in that state of the law rights have been acquired which would be affected or imperilled by later decisions changing the rule of law applicable to such facts, the Federal Courts for the protection of the vested and constitutional rights thus acquired will follow the earlier, not the later, decisions.

In *Douglass vs. Pike County,* Ch. J. Waite said that while the state courts had the right to change their opinions, such changes should (like a new statute) change the law only prospectively, not retrospectively, in its application to contract rights acquired on the faith of the earlier decisions. Now that is exactly the case here. When the Washington Street contract was let and the work done in 1888, and the first warrant issued in 1889, it was considered to be the unquestioned law of Washington that cities could make themselves liable on the contracts for street improvements, even if the cost

was to be raised by a special assessment. That is shown by the forms of contracts made in the earlier cases reported: that the city would guarantee payment; or would proceed without delay to make collection, or would cash the warrants if the assessments were not paid in promptly. In one case the court held that a city was equitably subrogated to the rights of warrant-holders whom it had paid. .....

On the faith of that state of the law the Williams warrant was issued and was bought by Elliott, and was put into judgment. Then, a few weeks after Elliott filed his demand for payment with the city council, and a few months before he got judgment, the Supreme Court of Washington made a decision that cast great doubt on the validity of street improvement warrants, overruled directly some of its earlier decisions and shook the authority of others; yet even that decision did not go so far as some later ones, but left it open to establish the city's liability by taking certain steps to compel its action.

If, then, we measure the facts of this case by the rule of *Gelpcke vs. Dubuque,* we see that it disposes effectually of three contentions of the defendants: (1) that the city is not and was not in 1898 liable on the original warrant, and on the Elliott judgment taken on it, and on the warrant in suit herein; (2) that because the Supreme Court of Washington has held in a line of cases beginning in

1897 against the city's liability, therefore the Elliott judgment was void for lack of jurisdiction; and (3) that because of that assumed exemption of the city from liability the acquiescence of the city council in the Elliott judgment instead of contesting it on appeal was a fraud on the taxpayers, concocted in a collusive agreement between *the entire city administration*—mayor, attorney, clerk, marshal and seven councilmen, all present at all the meetings and conferences—and the judgment creditor.

A few words further about this defense of fraud. In the first place, it is really not pleaded, although it is argued in the brief. Fraud must be proved, not surmised. But it must also be pleaded, not merely argued. The first defense pleaded (Transcript, pp. 11-32) is a strictly *legal* plea, that the judgment and warrant were void because the city could not be made liable. The second (Transcript, pp. 32-33) was the statute of limitations, based on an alleged repudiation of the compromise which was not attempted to be proved. The third defense (Transcript, pp. 33-36) was that the city council had made an agreement to let the warrant holders take default judgments, after the court had decided that a city could not be made liable on them, and after the city had exceeded its debt limit. Not a word

charges any secrecy, corrupt consideration, private understanding, collusion, or even knowledge of the city officials that the Supreme Court had recently decided as alleged. It is to be presumed that the city attorney knew the law, including the recent decision; but it is also to be presumed that he also knew the law as settled many years earlier by *Gelpcke vs. Dubuque,* and could see its application to the facts before him; and that weighing the law and the facts he advised his client through its constituted authorities that even if there was some doubt, or a "fighting chance," the equities were with the judgment creditors and that it was better for the city to settle. It is also to be presumed that he and all the rest of the officials were honest men. They were all engaged for three days as is shown by the council minutes in negotiations; all were present; there was no inside coterie which "fixed things up"; the meetings were in the day time, and their delays from day to day showed deliberation, effort for the best terms obtained, and suggest consultations with other citizens. Here is nothing which smells of fraud; and the attempt to put its stigma on a group of honest citizens who were trying to do their best for a city whose folly had plunged it into a bog of debt, and the fact that this attempt is sup-

ported by innuendo and suggestion without a bit of evidence shows the desperate straits of the defense.

(2) If the Elliott judgment was valid and is now unassailable, of course the warrant issued in lieu of it and in consideration of its discharge is equally beyond question. The statutes of Washington prohibit the issue of execution on judgments against municipal corporations, and provide no way of converting the judgment into cash except by issuing a warrant on proof of satisfaction of the judgment. Of course if the defenses against the original cause of action could be set up over again to defeat the warrant we would have an endless chain of putting claims into judgment, taking out warrants, putting those warrants into judgments, and repeating *ad infinitum*.

III.

THE PROCEEDINGS OF THE CITY COUNCIL WERE LAWFUL AND REGULAR.

The point of the defendants' argument is that the meetings of the council on February 16 and 17 were in violation of the statute, 2 Remington & Ballinger's Ann. Codes, Wash. § 7681, and of a city ordinance.

There are four answers to this argument. First, the meetings on February 16 and 17 were not adjourned meetings but the same meeting continued after the intermission of a recess. Taking a recess is a different thing from an adjournment; and evidently the council was particular to take a recess. It made a point of strict compliance with the law. Secondly, the statute is to be strictly construed and it does not forbid an order to pay a definite, liquidated sum of an unquestioned liability. The phrase, "Bill for the payment of money," clearly means unsettled accounts open to inquiry, adjustment or set-off. It does not mean an indisputable debt on judgment as to which the only topic of debate could be whether to pay it or contest it by appeal. Thirdly, the statute should not be construed as mandatory, where the act criticised is not of the essence of its proceeding. There was ample deliberation and debate; in the nature of things there could be no objection when the members had once made up their minds to ordering the appeal abandoned and the warrant issued at that meeting, instead of waiting two weeks for the date of the next regular meeting. Fourthly, as the learned trial judge well put it, the validity of the warrant does not depend on the regularity of the meeting or the proceedings, because

the city officers were compellable by *mandamus* to issue it. (Transcript, p. 49.) The city's counsel attempt to meet this by saying that the appeal being duly taken acted as a *supersedeas*. We admit that the appeal was taken in time and a bond was not essential to the appeal. But the statute does not enact that an appeal by a city without a bond shall act as a *supersedeas;* and as we understand the practice a bond is as needful from a city as from an individual to effect a stay. Therefore, the issue of the warrant could have been enforced pending the appeal. But waiving that, the council had decided to abandon the appeal, and had negotiated for a settlement, including a reduction of interest on that basis. Though the record is bare of any formal resolution to that effect, it is clear that such was the basis of the entire negotiation. It was the implied condition precedent, because it would be folly for either party to settle if the appeal were to stand. There is no showing whether an appeal was taken in any other than the *Elliott* case, or when the appeal periods would expire; but whether or not, the other judgment creditors accepted "the proposition of the city council" (Transcript, p. 72); and nothing in the statute as to council meetings forbids a negotiation and agreement about a judgment debt. There-

fore it results that after the city had waived its appeal, the judgment creditor was induced by its offer to satisfy the judgment and accept the warrant. The appeal being waived, the city could have been compelled to issue the warrant if it refused to; and if it repudiated the agreement it would have been equitably estopped to withhold the warrant when the judgment had been satisfied on the faith of the city's promise. Judge Hanford's inference, then, was exactly right.

Estoppel is as applicable to a city as to an individual.

2 *McQuillan on Municipal Corporations,* 1384.

Socy. for Savings vs. New London, 29 Conn. 174, 192.

N. H. W. R. R. Co. vs. Chatham, 42 Conn. 465, 479.

Gilberts vs. Rabe, 49 Ill. App. 418, 421.

On the general question of the regularity of adjourned meetings, see

2 *McQuillan on Municipal Corporations,* 1326, and cases cited.

State ex rel. Atkinson vs. Ross, 46 Wash. 28, applies the rule of liberal construction to council meetings, and in its reasoning sustains the foregoing remarks.

IV.

THE TREASURER WAS IN FUNDS TO PAY THE PLAINTIFF'S WARRANT.

The learned trial judge found as a fact that the treasurer had in his hands on December 1, 1910, when demand to pay the warrant was made more than enough applicable cash to pay it.

Transcript, p. 61.

All outstanding warrants dated on or before February 2, 1898, were called on April 15, 1908.

Transcript, p. 104.

The burden of proof was on the defendants to show that any other warrants were outstanding of prior date to the plaintiff's.

The plaintiff also proved that the city treasurer had received from the county treasurer sundry sums from sales of county realty (acquired by tax-foreclosure), sundry sums in 1909 and 1910 aggregating about $8000; and that by Ordinance No. 722 it was the city treasurer's "duty to turn in to the indebtedness fund all moneys received by the city from the county of Jefferson for its share of the proceeds of the sale of any county property."

Transcript, pp. 100-104.

The statute bearing on this subject as it was until March 16, 1897, is quoted at pages 21, 22 of the defendants' brief; and on page 22 follows the statute (Session Laws 1897, ch. 84) which went into effect on that date. The latter statute, as construed by the Supreme Court of Washington, created an "indebtedness fund," which was a substitute for the former "general fund," under the prior law (Hill's Ann. Codes, § 636; Session Laws 1893, ch. 57, § 2, Subd. 9, p. 105). But the change by the law of 1897 in the character, sources and disposition of the two funds could not affect rights of creditors vested before the latter act was enacted.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548.

The same tax—six mills—was imposed in each act for payment of indebtedness, and it became the duty of the city council to levy it each year. This was expressly ruled in the case just cited. While the later act could not lawfully deplete or divert the sources for paying city debts, it could and did simplify, systematize and strengthen the method of payment. Consequently all proceeds of lands sold for taxes and of county lands acquired by tax sales and later sold by the county were due to the indebtedness fund for the relief of creditors antedating (as Elliott

was) the act of 1897, notwithstanding section 8 of that act. And at the same time such prior creditors were entitled to have the moneys mentioned in § 647 of Hill's Codes (Session Laws 1890, ch. 7, § 128, p. 190) still deposited in the "general fund" which was succeeded by the "indebtedness fund." In this state of legislation and of the fact of treasury transactions shown by the record, a strong *prima facie* case of ample funds to pay the Elliott warrant, it was incumbent on the defendants, having in their own hands the evidence to disprove that conclusion if it existed, to produce such proof; and the fact that they have not done so is decisive that no prior charges on the "indebtedness fund" were outstanding and unpaid on December 1, 1910, and that there was then ample cash in hand to pay it.

The judgment below should be affirmed.

CHARLES E. SHEPARD,

Attorney for Defendant in Error.

Addendum to Point II.

Judgment on a general demurrer is final and concludes the merits.

Plant vs. Carpenter, 19 Wash. 624.

The defense of excess of constitutional limit of debt is barred by a judgment on the merits.

State ex rel. Gloyd, 14 Wash. 5.

Addendum to Point IV.

At the request of the defendants, the court modified its fifth finding of fact, respecting the amount in the treasurer's hands applicable to our warrant (Transcript, p. 61), and made it read more specifically (Transcript, pp. 65-66), that all obligations of the city prior or preferential to that warrant had been paid before the demand on December 1, 1910, and the treasurer then had in hand $4,674.69, proceeds of sale of land for taxes; and the same finding included §9 of Ordinance No. 722, defining the monies to go into the indebtedness fund, and forbidding the treasurer to pay any warrants on that fund except "special named classes," without special order of the City Council."

The city having ordered the issue of the warrant,

it was the treasurer's duty to pay it on demand if he was in applicable funds of five hundred dollars or more.

2 Remington & Ballinger's Code, §§3949, 7696.

It being his legal duty to pay it, refusal to pay was a breach of his official bond.

1 Rem. & Bal., §§958-59.

McConoughey vs. Jackson, 35 Pac. 863 (Cal.).

Rice vs. Gwynn, 49 Pac. 412 (Idaho).

Bank vs. Arthur, 54 Pac. 1107 (Colo.).

Ireland vs. Hammell, 57 N. W. 715 (Iowa).

The prohibition on the treasurer to pay it, without special order of the Council was void, as an attempt by city ordinance to override and obstruct the operation of state statutes.

Brown vs. Winterport, 9 Atl. 44 (Maine).

It is beyond question, then, that there was no prior claim, the treasurer was in funds, and he was bound to pay.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES L. INTERMELA and the AMERICAN SURETY COMPANY, a corporation, of the State of New York,
Plaintiffs in Error,
vs.
DAVID PERKINS,
Defendant in Error.
No. .....

Petition for Re-hearing

Now comes the plaintiffs in error by their attorney and counsel, U. D. Gnagey, and deeming themselves aggrieved by the judgment of this court affirming the judgment of the district court entered February 15, 1912, petitions for a re-hearing and a reversal of said judgment.

U. D. GNAGEY,
Attorney for Plaintiffs in Error.

I hereby certify that, in my judgment, the foregoing petition is well founded in law and is not interposed for delay.

U. D. GNAGEY,
Attorney for Plaintiffs in Error.

GROUNDS OF THE PETITION.

The grounds of the petition are as follows:

First. The court erred in deciding that the treasurer was in funds to pay the warrant in suit.

Plaintiffs in error raised this question not only by their non-suit, but also by a challenge to the sufficiency of the findings to support the judgment.

11 Specification of Error, brief p 14.
26 Assignment of Errors, p 122 of the Record.

In their brief on page 37, plaintiffs in error say: "The findings do not support the judgment, etc."

* * *

The fifth finding of fact is found on page 65 of the record and that portion of it material to this argument reads as follows: "and that between the 4th day of January, 1910, and the 1st day of December, 1910, both inclusive, said city treasurer received as the city's share of the proceeds of the sale of property that had been forfeited to the county for nonpayment of taxes the sum of $5674.69."

If this finding does not show the treasurer in funds, the judgment must fall. Defendant in error cannot go behind this finding and support his judgment by inferences that may be drawn from the bill of exceptions. Plaintiff never complained of these findings and the bill of exceptions is not here for

this purpose.

The court, in giving its decision, has taken from the bill of exceptions a part of a letter as follows:

From sales of county real estate, lands and premises	$ 851.23
From year 1904 tax rolls	.96
From year 1905 tax rolls	1.44
1906 tax rolls	8.14
1907 tax rolls	1922.86
Total	$2784.63

And from this part of the evidence draws the inference of funds, stating that the different tax rolls mentioned might contain a levy for the Indebtedness Fund. In the first place there is absolutely no evidence that there was a levy for the indebtedness fund for these years; and in the second place, the evidence was not introduced for any such a purpose. It was introduced solely for the purpose of showing receipts from the sale of county realty. One letter was introduced in full to show its nature and between whom passing, and all the others were introduced by simply showing the proceeds from the sale of county realty.

It would be a rather far-fetched inference even if it were in the findings, but as it is not in the findings it cannot be used to sustain this judgment. The judgment will have to stand or fall on the findings.

The court in its decision on page 8 uses the fol-

lowing language: "it would seem that there was competent evidence adduced from which the court could reasonably deduce its findings that the city treasurer was in funds sufficient to pay the warrant, and applicable thereto, at the time of its presentation."

I wish to call the court's attention to the fact that the lower court never made such a finding. It had made such a finding, as will be seen by a reference to the record, p. 61, finding "Fifth". But the court's attention having been called to the fact, it revised its "Fifth" finding on motion as shown by the record pp 64, 65 and 66, and instead of finding "that the defendant Intermela had in his hands, as treas urer of the City of Port Townsend, on that date more than sufficient money which was applicable to the payment of said warrant to fully pay the same, both principal and interest," the court realizing that there was nothing in the evidence to warrant such a finding, changed its fifth finding and found in this respect simply that the treasurer received a certain amount of money from the sale of county realty, making it large enough to cover both principal and interest, and leaving it as a question of law whether or not this money so coming from the sale of county realty was applicable to the payment of this warrant.

The court in its decision on page 8, says after a discussion of this matter. "There is far from being such a lack of evidence upon the subject as that this court will set aside the findings of the trial court."

It is not a question of setting aside the findings of the trial court. While plaintiff in error contend that their motion for a non-suit should have been granted, they also contend that the special findings of the lower court do not sustain the judgment. The findings of the court in this particular respect are in accord with the evidence, but they do not support the judgment in this, that they do not show that the treasurer had moneys belonging to this particular fund on which the warrant was drawn.

11 Specification of Error, Brief p 14.

AS TO DIFFERENT FUNDS.

It seems that the court is laboring under a wrong impression in regard to the different funds of the City of Port Townsend, and in regard to the status of the warrants in suit with reference to such funds.

The warrant in suit was issued and drawn on the Indebtedness Fund on February 18, 1897. (See copy of warrant, record p 4.) The law creating the Indebtedness Fund went into effect February 1, 1898.

This warrant was issued on this fund by agreement between the warrant holder and the City Council, after such law went into effect and the law of such fund must apply to its payment. This Indebtedness Fund is supplied only from two sources, first a special levy that the City Council may make; and second, delinquent taxes for the year 1896 or previous years.

Sections 3 and 7 of Act of 1897, L of 1897, p 222, Brief p 22.

This record absolutely fails to show that the treasurer, after the warrant in suit stood next in order of payment, received any money from either of these two sources, and fails to show that he had any funds on hand when the warrant was presented for payment properly belonging to the Indebtedness Fund.

The question of funds was one of the principal issues in the case and it should be decided by positive proof before the treasurer and his bondsmen should be held liable in damages. The allegations of the complaint are "that on said 1st day of December, 1910, and for several months prior thereto, there was and had been in the hands of the defendant, Charles L. Intermela as treasurer of the said City of Port Townsend, MONEY BELONGING TO THE INDEBTEDNESS FUND of said city, sufficient to pay the plaintiff's said warrant, both principal and interest in full," etc. and this allegation is denied and an issue raised upon it.

The warrants involved in the case of State *ex rel.* Polson v Hardcastle, 68 Wash. 548, had altogether a different standing. Those warrants were issued long before the Indebtedness Fund was created and were drawn on the General Fund. Afterwards the Indebtedness Fund was created and the law creating it took effect February 1, 1898. It was the intention of the law that all warrant indebtedness existing at the time of the taking effect of this law should be paid

out of this fund. But the court in the Polson case, *supra*, rightly decided that the holder of a warrant drawn on the General Fund before the Indebtedness Fund Law went into effect, could not be restricted to such Indebtedness Fund.

The City of Port Townsend had warrants outstanding similar to those involved in ths Polson case and they are mentioned in section 9 of Ordinance No. 722, found in the fifth finding of fact on page 66 of the record, as being drawn on the General Fund, Road Fund, etc.

Planiffs in error cited the Polson case simply for the purpose of showing that the city was under different obligations with reference to such warrant from its obligation with reference to the warrant in suit, and for the purpose of showing that the City Council could for legitimate purpose, place all moneys coming from the sales of County realty into the Indebtedness Fund, that is for the purpose of paying the warrants therein, that is in said section 9, mentioned, and yet none of such money really belonged to the Indebtedness Fund, unless it came from delinquent taxes for the year 1896 or previous years, and hence the restriction placed on the treasurer in regard to paying such money out, was perfectly legal, so far as the warrant in suit is concerned, so long as they did not try to keep him from paying out money that really belonged to the Indebtedness Fund.

There is absolutely no evidence that any of this

money really belonged to the Indebtedness Fund.

The case being against the treasurer and his surety for damages for dereliction of duty, and not against the City and the question whether the treasurer had sufficient money belonging to the Indebtedness Fund to pay this warrant, being one of the principal issues in the case, and really the important issue, by means of which defendant in error can proceed against the treasurer at all, it is difficult to understand why the court should not require positive proof on such issue.

I wish to call the court's attention again to the fact that it is not a matter of setting aside the findings of the lower court. The lower court never found that he had sufficient money belonging to the Indebtedness Fund to pay the warrant, but simply found that after plaintiff's warrant stood next in order for payment, the treasurer received a certain sum (more than the amount of the warrant) from the sales of county realty, and left the matter open as a question of law whether the money received really belonged to the Indebtedness Fund.

Again, the city treasurer could not be held liable for what the city council ordered him to do. The question is, what did *he* do? What is *his dereliction of duty* for which he is to be held liable? Where is the finding that shows that the treasurer was in funds, upon which he is to be held liable in damages?

As to the jurisdiction of the court in the case of Alonzo Elliott v the City of Port Townsend to render the judgment in satisfaction of which the warrant in suit was issued.

We are aware that there are all sorts of cases on the subject of jurisdiction, and to my mind, a great many of the distinctions that have been made between judgments that have been held void and those that have been sustained consist simply of words and not of controlling ideas.

As an example we will take the case of Branham v Mayor of San Jose, 24 Cal. 588. In this case the court ruled that as a municipal corporation lacks the power to mortgage its property, no title whatever can be based on a foreclosure of such a mortgage even after sale, confirmation and entry, and the judgment of foreclosure was held void.

The case at bar stands on the same footing as the San Jose case, *supra*. The judgment of foreclosure in the San Jose case was held void because such judgment was based upon an obligation against the City of San Jose, which it could not incur against itself. So the judgment against the City of Port Townsend in favor of Alonzo Elliott was based on an obligation against the city which it could not incur against itself. The controlling idea is the fact that the obligation which is made the basis of this judgment has no existence, and a court by its decision cannot create it.

The court in the San Jose case might have said that whether the city could bind itself by a mortgage on its property was one of the questions that the court would necessarily have to consider in foreclosing the mortgage, and the fact that it decided erroneously, does not make the judgment void. This is exactly what the court has said by its decision in the case at bar. But the decision overlooks the fact that there is no obligation and that the court cannot create one.

The case of Canal Bank v Partee, 99 U. S. 325, is based on the same principal.

In practically all of the cases cited by plaintiffs in error in which judgments have been held void for lack of jurisdiction, and in practically all cases that can be cited on the subject of lack of jurisdiction of subject matter, there was a point of law involved which it might be said the court rendering the judgment had the power to consider, and the fact that the court decided wrong does not make the judgment void. But if this idea be carried to its limit there could scarcely be a judgment that would be void for lack of jurisdiction of the subject matter, for whenever any court renders a judgment it really decides that it has the power to render it.

As stated in the argument before the court, the true line of distinction seems to be the fact that the claim on which the *void* judgment is based belongs to a class of claims on which there is no liability. If

it can be determined that there is and can be no obligation without going into the evidence in the particular case, the judgment is based on nothing and is void, and the court has no power to create something out of nothing.

State ex rel. Summerfield v Taylor, 14 Wash. 495.

In re Permstich, 3 Wash. 672 (By analogy.)

It was not necessary that a decision of the Supreme Court of the state absolutely declaring the nonliability of cities in such cases should have existed at the time the Elliott judgment was rendered. The real question is, What is the law now? Decisions of courts are necessarily retroactive. If the Supreme Court at that time had decided that the city could not be held liable in such cases, and the city officers after receiving knowledge of such decision had paid the judgment without appealing, it would simply show that there was "something rotten in Denmark," but it would not affect the legal question under consideration.

For instance in the case of State *ex rel.* Summerfield v Taylor, *supra*, the Supreme Court for the first time declared that counties are not subjet to garnishment, but there was no such decision at the time the judgment was rendered which was held void by the decision. In this case the court declared the law. The decision was not necessary to make the law. It was the law before the decision was made;

and although the law may have been doubtful before the decision, and the court rendering the garnishment judgment may have considered the matter and determined that it had jurisdiction to render such judgment, yet it was void, although we were not certain that it was void until the Supreme Court had finally spoken on the matter. In other words the decision in the case cited was retroactive and affected judgments rendered before the decision was given.

The same thing is true of the case of Granham v Mayor etc. of San Jose, 24 Cal. 585. In fact this argument applies practically to all cases where one judgment has been held void by another judgment.

In this way even a judgment of the Supreme Court was held void by a subsequent judgment of the same court.

Horan v Wahrensberger, 9 Tex. 313.
Collateral Attach., Van Fleets, sec. 77.

The decision of the Supreme Court in the case of the German-American Savings Bank v Spokane, 17 Wash. 315, was ample notice to every one not to rely on any decision made on the subject of street grade warrants that is not in harmony with such decision. If there had been no decision at all on the question, the decision of the court in the case at bar would affect the Elliott judgment just the same, and if this court would come to the conclusion that it was a jurisdictional matter, the Elliott judgment would fall.

This is the effect of all the decisions cited and it is not necessary to cite any more.

Now we admit that the decisions of the Supreme Court had been somewhat vacillatory before the decision in the German-American Savings Bank, *supra*, had been rendered, but from then on and now the law of the state is that cities are not liable for failure to collect special assessments and this was the law when the Elliott judgment was rendered.

As to the question whether the warrant was ordered at an adjourned meeting.

The law with reference to the meetings of the City Council is as follows:

"The city council together with the mayor, shall meet on the first Tuesday in January, next succeeding the date of said general municipal election, shall take the oath of office, and shall hold regular meetings at least once in each month, but not to exceed one regular meeting in each week, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor by written notice delivered to each member at least three hours before the time specified for the proposed meeting Provided, however, that no ordinance shall be passed or contract let or entered into or bill for the payment of money allowed, at such special meeting, or at an adjourned regular or special meeting. All meetings of the city council shall be held within the corporate limits of the city at such place as may be disignated by ordinance, and shall be public."

Sec. 7681 Rem. and Bal. Code.

By ordinance No. 585. Defendants Ex. 2. Record p 90, the time of the regular meetings of the City Council is fixed for the first and third Tuesday of each month, the hour varying in the diffierent months of the year.

The court has decided by the decision handed down that the warrant in suit was not ordered at an adjourned meeting, but concludes that it was ordered at a regular meeting which commenced on Feb. 15, and was continued on the 16th, and then again on the 17th, still calling it the regular meeting of the 15th. This seems to me utterly incompatible with the law and ordinance just set forth.

In the first place, the court should notice that there is in the law even a prohibition against holding more than one regular meeting a week, though it be with the sanction of an ordinance. If they can adjourn from day to day and keep in session three days, there is nothing to keep them from being in session the whole week, and if they can remain in session the whole week, what does the prohibition against holding more than one regular meeting a week mean?

It will be noticed that the statute uses the phrase "or at an *adjourned regular* or special meeting. The phrase "*adjourned, regular or special meeting*" stands for a certain idea, and it is a well known principle of statutory construction that if possible a meaning should be given to every word in the statute.

26 Am. & Eng. Enc. 618.

If the meeting under consideration held on Feb. 17, 1898, was not an adjourned meeting, what is an adjourned meeting?

The court by its decision has simply cut this part of the prohibition from the statute. The city council consists of a body of men of limited powers. They are the agents of the tax payers, and the tax payers have defined their authority and limited their power by public law. The person dealing with them is bound to know the limitation on their authority at his p eril. If the tax payers in this particular instance have not succeeded in protecting themselves against such acts as are shown by this record, then it is difficult to see how they can protect themselves and still allow the council to do business for them.

In this connection, the court on page 15 and 16 says: "But an adjournment from day to day does not bring the session to a close. It may terminate the meeting, but not the session. Adjournments taken from day to day, or even to a day certain, do not interrupt the business of the session. It proceeds as of the same session. Roberts Rules of Order."

We may take it for granted that an adjournment applied to a body whose sitting is termed a session, does not terminate the session. But we are not applying it in this law to a session but to a meeting, and a meeting at that which is to be held according to law and ordinance on a certain day. Remember

that it is the adjournment to which the prohibition applies. The City Council, according to law and ordinance, meet on a certain day at an hour specified. The law does not contemplate a session from day to day, and even if it did, the law clearly prohibits them from doing certain business after an adjournment and before the next regular meeting. It uses the words "adjourned, regular or special meeting." If they once meet in regular session and then adjourn to another day, although they may call it a recess, when they meet again according to adjournment, their meeting is an adjourned meeting.

The court further says: "In the present case the council met at a regular meeting, and, finding itself unable to complete or transact the business in hand"; and again further on, "we are disposed to believe that an adjournment from day to day, when impelled by business in hand," etc.

There is nothing in the record to show that they were "unable to complete or transact the business in hand". This is a pure inference by the court. The lower court simply found as a fact that the council continued its sessions upon the two succeeding days.

On page ten the court says: "There is no evidence in the record, showing that the City of Port Townsend was indebted beyond its statutory limitations at the time the indebtedness was incurred for the local street improvements in question, although the answer alleges facts showing that such was the case."

The court is in error as to what the answer alleges. The answer does not allege that the city was indebted beyond the limit at the time of constructing the local improvement, but the answer does allege that such debt limit had been exceeded in 1898, when the warrant was issued about ten years after the construction of said local improvement.

I wish to call the court's attention especially to the fact that all the allegations of the answer with reference to the debt limit are admitted by a failure to deny, so that no evidence was required on this point. In fact all the allegations of the third defense in the answer (Record p 33) with reference to the amount of warrants that were issued, the manner in which they were issued, the amount outstanding, that the voters never ratified the incurring of said indebtedness, that the city allowed a certain amount of street grade warrants to go to judgment by default and that afterwards the city ceased this policy and did not allow any more street grade warrants to go to judgment, and a number of other things alleged in paragraphs 2, 3 and 4 of said third affirmative defense are admitted by a failure to deny. The allegagation that the appeal was properly taken from the Elliott judgment was denied, but this was clearly proved on the trial and the court so found. (Record p 61, 3rd finding.) Defendants asked the court to make findings covering the admitted facts in this third defense and the facts proved by the evidence that were denied in the reply thereto, but the court

refused to do so, and this is properly assigned as error. See defendant's proposed findings 10, 11 and 12, pp 55 and 56; 17th, 18th and 19th Assignment of Errors, Record. pp 119 and 120.

I will ask the court to read these proposed findings or the third affirmative defense and the reply thereto together with the proofs taken on the issues raised thereby, and consider it in connection with the other facts proved and admitted in the case, and see if there is not such a state of facts disclosed as would convince any one that "fraud" is the only word that will explain it. The record discloses the fact that at the "adjourned meeting" of the City Council held on Feb. 17, 1898, they issued over $65,000 of warrants (see plaintiff's Ex. A, p 70) all based on claims which the Supreme Court had decided was not a liability against the city, practically the full amount of the constitutional debt limit of 5 per cent. There was an appeal pending from the Elliott judgment, and so far as the warrant in suit is concerned, it was issued voluntarily. The appeal taken had operated as a stay. There was no immediate necessity for issuing it, and it was the same with the other warrants ordered. A simple notice of an appeal served and filed without a cent of expense would have operated as a stay of all the judgments. Had they simply sent the judgment roll to the Supreme Court in the Elliott case together with the notice of appeal, the Supreme Court would have done the same thing that they did in the case of Doxy v Port Townsend, 21 Wash. 707, cited in defendant's brief. In the Doxy case, a judg-

ment by default had been taken against the city on a street grade warrant. The opinion of the Supreme Court is as follows:

"Upon authority of German-American Savings Bank v Spokane, 17 Wash. 315, the judgment of the Superior Court is reversed."

The City Council is acting only in a representative capacity; they have such powers as are given to them expressly and such as are fairly implied from those expressly granted and no others. This is elementary law, and it is not necessary to cite authorities. Yet by their acts, and at a time expressly prohibited by statute, they place the city in debt practically to the full amount allowed by the constitution. The tax payers must and ought to have some way of protecting themselves.

If one reads the minutes of the City Council with reference to the issuing of these warrants (Plaintiffs Ex. A, B and C, pp 70 to 76) the unsophisticated might conclude that it was the members of the City Council that were on the anxious seat, and that the judgment creditors were indifferent to what the actions of the council might be, but if one stops to consider for a moment and remembers that they had only the judgment of the Superior Court, that one case was actually pending on appeal and the time for appeal in the other cases just beginning to run, that these judgment creditors were all represented by good lawyers, and must have known what show their judgments had before the Supreme Court, one can

easily imagine that it was the judgment creditors that were really the anxious ones, and that it was they, the judgment creditors, who could not wait till the next regular meeting of the council to have their warrants issued.

We submit that this judgment should be reversed because plaintiff has not shown the treasurer to be in funds out of which payment of the warrant in suit can be forced.

Because the warrant in suit is void, because issued in satisfaction of a judgment void for want of jurisdiction of the subject matter, void because issued at an adjourned meeting of the City Council against an express statutory prohibition, and void because issued under such circumstances as to make it fraudulent.

This is an important case to the city; it may involve not only three thousand dollars, but a hundred thousand dollars—one and one-half times the constitutional debt limit of the city as fixed by the constitution of the state. And if the court has the slightest doubt on any of the points raised, this petition should be granted and the cause set down for reargument. Respectfully submitted,

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